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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 237

SUN SHIPBUILDING COMPANY, APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

FILED DECEMBER 30, 1924

(30,781)

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INDEX

	Original	Print
Record from Court of Claims	1	1
Petition	1	1
Exhibit "A"—Contract	13	7
General traverse	33	18
Argument and submission	33	18
Findings of fact	34	19
Conclusion of law	38	23
Opinion, Downey, J.	39	24
Judgment	42	27
Proceedings after judgment	42	27
Petition for appeal	43	27
Order allowing appeal	43	28
Clerk's certificate	44	28

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[fol. 1] IN COURT OF CLAIMS OF THE UNITED STATES

No. B317

SUN SHIPBUILDING COMPANY, Plaintiff,

vs.

THE UNITED STATES

I. PETITION—Filed October 30, 1922

To the Honorable Chief Justice and Associate Judges of the Court of Claims:

The plaintiff, above named, for its petition herein respectfully shows to the Court:

For a First Cause of Action

I

The Sun Shipbuilding Company, at the times hereinafter mentioned, was and is a corporation organized and existing under the laws of the State of Pennsylvania, and was and is the owner of a shipbuilding plant in the City of Chester, Pennsylvania.

II

Prior to June 11, 1917, the plaintiff, in addition to other work [fol. 2] under contract, had contracts with various persons for the construction of eighteen sea-going vessels of approximately 10,000 dead weight tons, including four of such steamers for the United States Shipping Board, and said contracts for the eighteen steamers mentioned and its other contracts constituted sufficient work to occupy all of plaintiff's docks and ways and other shipbuilding facilities to their full capacity.

III

By the "Naval Emergency Fund" provision of the "Act making appropriations for the Naval Service for the fiscal year ending June 30, 1918" approved March 4, 1917, it was provided in part as follows:

"To enable the President to secure the more economic and expeditious delivery of materials, equipment and munitions and secure the more expeditious construction of ships, authorized and for the purchase or construction of such additional torpedo boat destroyers, submarine chasers, and such other naval small craft, including aircraft, guns and ammunitions for all of said vessels and aircraft and

for each and every purpose connected therewith, as the President may direct, to be expended at the direction and in the discretion of the President, $115,000,000, or so much thereof as may be necessary and to be immediately available.

* * * * * * *

"That in time of war, or national emergency arising prior to March first, nineteen hundred and eighteen, to be determined by the President by proclamation, the President is hereby authorized and empowered, in addition to all other existing provisions of law:

"First. Within the limits of the amounts appropriated therefor, [fol. 3] to place an order with any person for such ships or war material as the necessities of the Government, to be determined by the President, may require and which are of the nature, kind, and quantity usually produced or capable of being produced by such person. Compliance with all such orders shall be obligatory on any such person to whom such order is given and such order shall take precedure over all other orders and contracts theretofore placed with such person. If any person owning, leasing or operating any factory equipped for the building or production of ships or war material for the Navy shall refuse or fail to give to the United States such preference in the execution of such an order, or shall refuse to build, supply, furnish or manufacture the kind, quantity or quality of ships or war material so ordered at such reasonable price as shall be determined by the President, the President may take immediate possession of any factory of such person, or of any part thereof without taking possession of the entire factory, and may use the same at such times and in such manner as he may consider necessary or expedient.

* * * * * * *

"Fourth. To requisition and take over for use or operation by the Government any factory, or any part thereof, without taking possession of the entire factory, whether the United States has or has not any contract or agreement with the owner or occupier of such factory.

* * * * * * *

"(d) That whenever the United States shall cancel or modify any contract, make use of, assume, occupy, requisition, or take over any factory or part thereof, or any ships or war material in accordance with the provisions of paragraph (b), it shall make just com- [fol. 4] pensation therefor, to be determined by the President, and if the amount thereof so determined by the President is unsatisfactory to the person entitled to receive the same, such person shall be paid fifty per centum of the amount so determined by the President, and shall be entitled to sue the United States to recover such further sum as added to said fifty per centum as shall make up such amount as

will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code."

IV

On or about May 16, 1917, the Secretary of the Navy requested of plaintiff information as to availability of facilities for the construction of certain Fleet Mine Sweepers or Tenders, designated by the Navy Department as seagoing mine sweepers. The plaintiff sought to be relieved from constructing said small craft and forwarded by telegraph the following communication to the Navy Department:

"June 11, 1917.

"Admiral D. W. Taylor, Navy Department, Washington, D. C.:

"Investigation discloses that building mine sweepers will greatly hamper our yard and curtail output vastly as no other large yards is building these sweepers and as many small yards are well equipped and anxious to do this we protest vigorously against being so compelled. Our plant solely constructed for building ten thousand ton vessels which we have eighteen contracted for including four for [fol. 5] Shipping Board. If we have no other alternative kindly forward contract for our signature. We shall probably buy or build plant for this purpose.

Sun Shipbuilding Company."

On or about June 12, 1917, the Secretary of the Navy, on behalf of the President, placed with the plaintiff a requisition order in writing which provided in parts as follows:

"Referring to your telegram of June 11, 1917, in reference to the construction of seagoing mine sweepers, the President hereby places with you, as an order under the provisions of the Naval Appropriation Act of March 4, 1917, the requirement that you comply with the terms of a contract, to be signed hereafter, to construct seagoing mine Sweepers Nos. 22, 23 and 24."

By a certain order or contract in writing, which was within the limits of the said appropriation available, and dated June 13, 1917, detailed provision was made for the construction by the plaintiff of the said three seagoing mine sweepers, said instrument containing the words that "the President hereby places with the Sun Shipbuilding Company as an order under the provisions of said Act of March 4, 1917, the requirement that it comply with the contract, hereinafter set forth, to construct three of said vessels, complete in all respects" * * *.

Said order or contract of June 13, 1917, in part further provided:

"Whereas, the department has contracted with the Harlan & Hollinsworth Corporation, of Wilmington, Del., for their services [fol. 6] without expense to the contractor to—

"(a) Prepare all detail working plans, obtain the approval thereof by the American Bureau of Shipping and by the department, as may be necessary, and furnish to the contractor such blue prints thereof as he may require; (b) prepare all schedules of materials; (c) place all orders for all materials for delivery to the contractor, except such minor items of material, and such indirect material as is customary to have in stock and is not usually ordered specifically for the vessel; (d) make all patterns; all as may be necessary for the construction of the said vessels complete in all respects, in accordance with the drawings, plans, and specifications aforesaid.

* * * * * * *

"Fourth. The material to be used in the construction of these vessels will be ordered by the Harlan & Hollingsworth Corporation, subject to the approval of the department, as aforesaid, for delivery direct to the contractor, who will receive the same and make payment direct to the individual, firm, or corporation with whom the order has been placed, at the price stipulated in the order, and in accordance with the terms and payment as may be arranged by the contractor direct with such individual, firm, or corporation; the amounts so paid for material will enter into the actual cost of the vessel and will be repaid to the contractor in the manner hereinafter provided for. The contractor will make such examination and inspection as may be necessary of the material thus purchased immediately upon its delivery, and will immediately invite the attention of the department or its representative to any material which, in its opinion, is inferior in quality or not suitable for the purpose for which in- [fol. 7] tended, but the contractor will not be responsible for the quality or suitability of such material. The contractor will furthermore supply such assistance as may be required to the inspectors of the department and of the American Bureau of Shipping in making any tests and inspection of such material at the shipyard considered necessary by such inspectors."

* * * * * * *

VI

At or about the time said requisition order was placed with the plaintiff, the Secretary of the Navy and his agents acting for the President, directed the plaintiff to keep one of its shipbuilding ways, designated as No. 5, free and clear of all other work in order that the same might be available for the performance of said order dated June 13, 1917; and plaintiff, in compliance with said instructions of the Secretary of the Navy and his agents, kept said way free and clear of all other work, and the way remained idle on account of the failure of the Navy Department to supply material until October 8, 1917, the date of laying the first keel, or 112 days; and the further unreasonable delay of the Navy Department in the supply of material caused the way to remain occupied on the work to May 30, 1918, or a total of 345 days.

VII

Under the conditions existing at the time, a fair and reasonable period for the construction of said three mine sweepers was 118 days. However, notwithstanding plaintiff's repeated request for the de- [fol. 8] livery of said material, and its readiness and willingness immediately to perform, the Secretary of the Navy and his agents so neglected and failed to supply the necessary material for the performance of said work, that plaintiff was unable to lay the keel of the first of said boats until about October 8, 1917, and by reason thereof and subsequent neglect and delays of the defendants and their agents, and through no fault of plaintiff, said Shipbuilding Way No. 5 remained idle and unproductive to the plaintiff for a total period of 228 days. By reason of the premises and the said requisition orders of June 11 and 13, 1917, and the said Act of March 4, 1917, there arose and exists an implied promise on the part of the United States to pay as just compensation to the plaintiff for the period said way was unoccupied and unproductive, the sum of $108,258.96.

VIII

On information and belief, in compliance with the provisions of said Act of March 4, 1917, there was set up by the Secretary of the Navy, a Compensation Board to hear and determine on behalf of the President, claims of the nature of the one herein presented, and prior to the institution of this suit the plaintiff duly presented this claim to the said Compensation Board and said claim was disallowed. The plaintiff accordingly brings this suit in the Court of Claims, not being satisfied with the decision of said Compensation Board in denying plaintiff's claim.

IX

Plaintiff and its officers at all times have borne true allegiance to the Government of the United States and have not in any manner or way aided, abetted or given encouragement to rebellion against the United States.

[fol. 9]

X

No assignment or transfer of this claim has been made and the said amount is due to plaintiff after allowing all just credits and offsets.

For a Second Cause of Action

The plaintiff for a Second cause of action realleges the statements contained in the paragraph above designated as I, II, III, IV, V, VIII and IX, and begs leave to have the same considered as a part hereof, as if herein fully set forth.

XII

A copy of said order or contract dated June 13, 1917, mentioned in paragraph designated "V" above is hereto annexed and made a part hereof as Exhibit "A."

XIII

At all times after plaintiff received said order or contract of June 13, 1917, plaintiff duly substantially performed each and every term and condition thereof, except in so far as due performance was prevented by the defendants and its agents, as set forth in the above stated First cause of action, and plaintiff duly delivered to the defendants the last of the three said mine sweepers constructed in accordance with the defendant's orders and requirements, on the approximate date September 5, 1918.

[fol. 10]

XIV

The said order or contract of June 13, 1917, among other things, provided in paragraphs designated "Sixteenth" and "Seventeenth" thereof, to which reference is made, the manner of determining the compensation which was due plaintiff for the performance of said work described in said order. However, notwithstanding plaintiff's due performance of the terms and conditions thereof, the defendants have failed and refused to reimburse plaintiff for said items of cost as provided therein to be paid and which should be paid as a part of compensation due plaintiff for the work performed and material furnished on said work. Said item of cost and compensation due plaintiff consist of:

1. Salaries paid for said work in the sum of $1,000.76, and 10% thereof amounting to $100.08, aggregating $1,100.84.

2. Item of 10% on certain retroactive wages paid by plaintiff, said 10% amounting to $1,335.70.

3. An item for amortization or depreciation of values of plant and property described in said order or contract, amounting to $95,773.75.

XV

Said order or contract further contained the following provision:

"Ninth. On completion of the dock trials above mentioned, and when the vessel is substantially completed, except minor items of work that may, in the discretion of the Secretary of the Navy, be [fol. 11] left unfinished until after delivery, the vessel shall be delivered and shall thereupon be conditionally accepted, and the department shall take possession of the vessel and shall be responsible for the safety thereof, and payment of all money due under this contract shall be made, subject, however, to a special reserve therefrom of $5,000, as provided for under paragraph 2 of the sixteenth clause of this contract.

* * * * * * *

"If on the expiration of six months from the date of conditional acceptance of the vessel there shall appear no weakness, deficiency, defect, failure, breaking down, or deterioration, due to workmanship in her other than that due to fair wear and tear, then she shall be finally accepted, and the said special reserve less such deductions as may be made under the provisions of this contract shall be paid: provided, however, that the deduction for the breach of guaranties and agreements as to workmanship shall be limited to five thousand dollars ($5,000)."

XVI

On information and belief, within a period of six months after the completion of said seagoing mine sweepers, there did not appear any weakness, deficiency, defect, failure, breakdown or deterioration due to workmanship in them, other than due to fair wear and tear; yet, notwithstanding the premises the defendants have failed and refused to pay to plaintiff a balance due from an amount reserved under said paragraph "Ninth" above in the sum of $1,500.

[fol. 12]

XVII

No assignment or transfer of this claim has been made and the said amounts are due to plaintiff after allowing all just credits and offsets.

Wherefore, for the reasons stated in the First and Second causes of action above set forth, the plaintiff respectfully demands judgment against the defendants for said sums, $108,258.96; $4,400.84; $1,335.70; $95,773.75; and $1,500.00, aggregating in all the sum of $211,269.25.

Sun Shipbuilding Company, by Frank S. Reitzel.

Sworn to by Frank S. Reitzel. Jurat omitted in printing.

[fol. 13]

EXHIBIT A TO PETITION

No. 28848

Contract for the Construction of Seagoing Mine Sweepers Nos. 22, 23, and 24

Contract of two parts made and concluded this 13th day of June, A. D. 1917, by and between the Sun Shipbuilding Company, a corporation of the State of Pennsylvania, represented by J. Howard Pew, president of said corporation, party of the first part (hereinafter called the contractor), and the United States, represented by the Secretary of the Navy, party of the second part (hereinafter called the department).

Whereas the act of Congress making appropriations for the naval service for the fiscal year ending June 30, 1918, approved March

4, 1917, under the title naval emergency fund, authorizes the President to construct or purchase such naval small craft as he may direct in addition to the vessels authorized in said act; and

Whereas the drawings, plans and specifications for seagoing mine sweepers have been duly provided, adopted and approved by the department; and

Whereas the Congress having declared by joint resolution, approved April 6, 1917, that war exists between the United States and Germany, the President hereby places with the Sun Shipbuilding Company, as an order under the provisions of said act of March 4, 1917, the requirement that it comply with the contract, hereinafter set forth, to construct 3 of said vessels, complete in all respects, with [fol. 14] the exceptions stated in the specifications, which vessels are for the purposes of this contract designated and known as seagoing mine sweepers, Nos. 22, 23 and 24.

Whereas the department has contracted with Harlan & Hollingsworth Corporation of Wilmington, Del., for their services without expense to the contractor to:

(a) Prepare all detail working plans, obtain the approval thereof by the American Bureau of Shipping and by the department, as may be necessary, and furnish to the contractor such blueprints thereof as he may require; (b) prepare all schedules of materials; (c) place all orders for all materials for delivery to the contractor, except such minor items of material, and such indirect material as is customary to have in stock and is not usually ordered specifically for the vessel; (d) make all patterns; all as may be necessary for the construction of the said vessels complete in all respects, in accordance with the drawings, plans, and specifications aforesaid.

Now, Therefore, This Contract Witnesseth, That, in consideration of the premises, and for and in consideration of the payments to be made as hereinafter provided, the contractor hereby covenants and agrees to and with the department as follows, that is to say:

First. The contractor will make the necessary outlays in advance and will construct 3 seagoing mine sweepers of approximately 950 tons trial displacement each; said vessels to be new and of American registry and to conform to the plans and specifications provided by the department, as stated above, and to the plans prepared by the Harlan & Hollingsworth Corporation, and approved by competent authority, [fol. 15] as provided for herein and provided with fittings, equipment, Machinery, devices, appliances, and appurtenances of every kind with latest improvements, complete in all respects, and ready for service, and will deliver the vessels to an officer, designated by the department, at the contractor's works.

Second. The vessels shall be inspected during the progress of the work by the surveyors of the American Bureau of Shipping, and the inspection certificate of the highest rating for seagoing vessels of that organization must be obtained and furnished when the vessels are ready for delivery. Tonnage certificate, in duplicate, will also be

obtained from the Commissioner of Navigation and furnished at the time of delivery. One of these certificates will at the same time be furnished the Bureau of Construction and Repair. All expenses of inspection and certificates to be borne by the contractor. The department reserves the right to appoint visiting inspectors to examine the quality of the work, but without any authority to make changes therein.

Third. The construction of said vessel (the word vessels as used throughout this contract being intended to include everything covered by the drawings, plans, and specifications above referred to) shall conform in all respects to and with said drawings, plans, and specifications, including duly authorized changes therein, which are hereto annexed, and shall be deemed and taken as forming a part of this contract with the like operation and effect as if the same were incorporated herein. They contain information of a confidential character that cannot be made public without detriment to the Government's interests, and they are to be treated as confidential by the parties to this contract. No omission in the drawings, plans, and [fol. 16] specifications of any detail, object, or provision necessary to carry this contract into full and complete effect in accordance with the practice established at the time of the signing of this contract, in accordance with the object and intent of the acts of Congress above referred to, shall operate to the disadvantage of the department, but the same shall be satisfactorily supplied, performed, and observed by the contractor, and compensation by reason of, or for, or on account of, such extra performance, shall be made to the contractor on the same basis as for the work performed in general under this contract; and it is hereby further provided, and this contract is upon the express condition, that the provisions of this contract, and the drawings, plans, and specifications aforesaid may be changed by the department, but no such changes shall be made when the cost thereof, shall, in the execution of the work, exceed five hundred dollars ($500) except on the written order of the Secretary of the Navy.

Fourth. The materials to be used in the construction of these vessels will be ordered by the Harlan & Hollingsworth Corporation, subject to the approval of the department, as aforesaid, for delivery direct to the contractor, who will receive the same and make payment direct to the individual, firm, or corporation with whom the order has been placed, at the price stipulated in the order, and in accordance with the terms and payment as may be arranged by the contractor direct with such individual, firm, or corporation; the amounts so paid for material will enter into the actual cost of the vessel and will be repaid to the contractor in the manner hereinafter provided for. The contractor will make such examination and inspection, as may be necessary, of the material thus purchased immediately upon its delivery, and will immediately [fol. 17] the attention of the department or its representative to any material which, in its opinion, is inferior in quality or not suitable

for the purpose for which intended, but the contractor will not be responsible for the quality or suitability of the material. The contractor will furthermore supply such assistance as may be required to the inspectors of the department and of the American Bureau of Shipping in making any test and inspection of such material at the shipyard considered necessary by such inspectors.

Fifth. The workmanship on said vessels, in detail and finish in all parts, shall be first class and of the very best quality usual in American seagoing vessels, and shall, at all times, be subject to the inspection of the American Bureau of Shipping and of the visting inspectors appointed by the department; it being hereby understood, covenanted, and agreed, that the visiting inspectors may, with the approval of the department, peremptorily reject any unfit workmanship if below the standard of the American Bureau of Shipping for vessels of this class. The contractor shall furnish the inspectors with full facilities for the inspection herein provided for.

Sixth. Said vessel and all materials and appliances provided by either the contractor or the department, for and used, or to be used, in the construction thereof shall be kept duly insured against fire and marine risks, settling of stocks, breakage of ways, and risks of launching, which insurance shall be renewed and increased, from time to time, by the contractor, until the delivery of the vessel, the loss, if any, to be stated in the policies as payable to the Secretary of the Navy; the insurance to be effected in such manner and in such companies as shall be approved by him, and in an amount to [fol. 18] be fixed, from time to time, by him, not exceeding the sum of the payments made under this contract.

Seventh. Unless prevented by strikes, the work under this contract shall be prosecuted at all times with the utmost vigor and dispatch, without interruption for any cause within the control of the contractor, and the number and class of men engaged on the contract, and the hours of work, subject to the limitations in the thirteenth clause, shall be subject to the approval and direction of the department. It is understood that the contractor proposes to extend its present plant and to add to its present facilities especically for the purpose of carrying out this contract as may be neccessary, and that it is to be especially compensated therefor hereinafter provided for, but the contractor will not be required to build a dry dock capable of accommodating this vessel.

Eighth. When each vessel is substantially complete, except minor items of work, which may, in the discretion of the department, be left unfinished, the contractor shall make such trials at dock as may be directed by the department, and shall correct defects and deficiene-es as directed by the department or its representative. After delivery, as hereinafter provided for, and prior to the expiration of 6 months and 10 days therefrom, the vessel may be subjected to such trials, at the expense of the department, as maye be prescribed by the Secretary of the Navy.

Ninth. On completion of the dock trials above mentioned, and when the vessel is substantially completed, except minor items of work that may, in the discretion of the Secretary of the Navy, be left unfinished until after delivery, the vessel shall be delivered and shall thereupon be conditionally accepted, and the department shall [fol. 19] take possession of the vessel and shall be responsible for the safety thereof, and payment of all money due under this contract shall be made, subject, however, to a special reserve therefrom of $5,000, as provided for under paragraph 2 of the sixteenth clause of this contract.

In case of conditional acceptance of said vessel, the said special reserve of five thousand dollars ($5,000) shall be held for a period of six months from the date such acceptance takes effect, provided, that during said period the vessel may be tried, after being fully equipped, armed, or weighted correspondingly, and in all respects complete and ready for sea, under conditions prescribed or approved by the Secretary of the Navy, the expenses of such trials to be borne by the department.

If at any times within six months after the conditional acceptance of said vessel any weakness, deficiency, defect, failure, breaking down, or deterioration in the vessel due to workmanship of the contractor other than that due to fair wear and tear, shall appear, the same shall be corrected and repaired to the satisfaction of the Secretary of the Navy, at the expense of the contractor.

If on the expiration of six months from the date of conditional acceptance of the vessel there shall appear no weakness, deficiency, defect, failure, breaking down, or deterioration, due to workmanship in her other than that due to fair wear and tear, then she shall be finally accepted, and the said special reserve less such deductions as may be made under the provisions of this contract shall be paid: Provided, however, that the deduction for the breach of guaranties and agreements as to workmanship shall be limited to five thousand dollars ($5,000).

[fol. 20] The contractor shall be informed of all defects and deficiencies discovered during said period for which it is held responsible, and the decision of the Secretary of the Navy as to the responsibility of the contractor for such defects and deficiencies shall be final and binding on the parties to this contract. The actual cost of making good all defects and deficiencies for which the contractor is held responsible shall be deducted from the payment to be made in final settlement under this contract; Provided, that in order to expedite such final settlement, if the work of remedying any of the reported defects shall not have been undertaken within six months from the conditional acceptance of the vessel, the estimated cost of making good such defects shall be ascertained and determined by the Compensation Board and deducted in lieu of the actual cost of such items in final settlement, as aforesaid.

Tenth. In case of the failure or omission of the contractor at any stage of the work prior to its completion, not due to strikes

or any other cause or causes beyond its control, to go forward with the work and make satisfactory progress towards its completion, the department may declare this contract forfeited. In case such forfeiture shall be declared, the title to said vessel, or so much thereof as shall have been completed, and to all materials on hand applicable thereto, shall forthwith vest in the department; and the department may immediately enter the works and premises of the contractor and take possession of said vessel and materials. The Secretary of the Navy shall thereupon cause to be taken and filed a full and complete statement and inventory of all work done or begun in, upon, or about said vessel, and of all materials purchased therefore by a board consisting of not less than five persons, quali-
[fol. 21] fied by knowledge and experience for the discharge of their duties, to be appointed by the Secretary of the Navy, which board shall proceed without unnecessary delay to examine such work and materials, and upon such examination the contractor may attend, by representative, and if it so desires, by counsel, and submit such evidence as the board may deem proper.

Eleventh. On receipt of the report and inventory of said board, and on its approval thereof, the department may proceed with the completion of said vessel in accordance with this contract, either at the works of the contractor or elsewhere, by contract or otherwise, in its discretion, using for that purpose all suitable materials on hand, and included in the inventory aforesaid, and may remove said vessel and materials to such other place or places as may be requisite to the exercise of such discretion, and the contractor, on receiving notice of the intention of the department to proceed with the completion of the work, will surrender said vessel and all materials on hand, together with the use, if required, of the yard or plant, and all machinery, tools, and appliances appertaining thereto and theretofore used, or necessarily to be used, in and about the finishing of the work.

Twelfth. Upon final settlement of the liability of the contractor under this contract it shall be paid such amounts for accrued but unpaid parts of item (a) and under items (b), (c), (d), and (e) of paragraph 1 of the sixteenth clause of this contract, together with such allowances for adjustment of special rental provided for under the seventeenth clause, as shall be determined by the compensation board.

Thirteenth. Subject to the conditions enumerated in Section 2 of [fol. 22] the eight hour law of June 19, 1912, no laborer or mechanic doing any part of the work contemplated by this contract, in the employ of the contractor or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work more than eight (8) hours in any one calendar day upon such work. Upon each violation of this provision a penalty of five dollars ($5) shall be imposed for each laborer or mechanic for

every calendar day in which he shall be required or permitted to labor more than eight (8) hours upon said work, and the amount of any such penalties shall be withheld for the use and benefit of the United States from any money becoming due under this contract, whether the violation of this provision is by the contract or any subcontractor; provided, however, that if Executive Order No. 2554, of March 22, 1917, wherein the President declares as follows, viz:

"In order to enable the Navy Department to meet the requirements of the law to secure the more expeditious construction of ships and procurement of munitions authorized, and by virtue of the authority vested in me by the provisions of the act of Congress approved March 4, 1917, entitled 'An Act making appropriations for the naval service for the fiscal year ending June thirtieth, nineteen hundred and eighteen, and for other purposes' whereby it is provided 'That in case of national emergency the President is authorized to suspend provisions of law prohibiting more than eight hours labor in any one day of persons engaged upon work covered by contracts with the United States: Provided further, that the wages of persons employed upon such contracts shall be computed on a basic day rate of eight hours, with overtime rates to be paid at not less than time and one-half for all hours work in excess of eight hours,' I do hereby authorize the suspension of the provisions [fol. 23] of law prohibiting more than eight hours of labor in any one day of persons engaged in such work under the contract with the Navy Department in all navy yards and private establishments where such suspension of the provisions of the law will result in hastening preparation to meet present emergency conditions."

shall be made applicable to work under this contract and that if overtime work is authorized under the terms of this or other acts, the hours of such overtime shall be subject to the approval and direction of the department.

Fourteenth. This contract shall not, nor shall any interest therein, be transferred by the contractor to any other person or persons, and in the performance of this contract no person shall be employed that is under sentence of imprisonment at hard labor.

Fifteenth. No member or delegate of Congress, officer of the Navy, nor any person holding any office or appointment under the Navy Department, is or shall be admitted to any share or part of this contract, or to any benefit to arise therefrom; but this stipulation, so far as it relates to Members or Delegates to Congress, shall not be construed to extend to this contract, it being made with an incorporated company.

Sixteenth. The department, in consideration of the premises, does hereby contract, promise, and engage to and with the contractor as follows:

1. The price to be paid for the vessel to be constructed and furnished in accordance with this contract, including authorized changes herein, shall be the actual cost, plus 10 per cent for profit. For the purpose of this contract actual cost shall be generally as defined in the revenue bill approved September 8, 1916, Section 302, [fol. 24] insofar as the requirements of the said revenue bill are applicable to and not inconsistent therewith. The accounts and records of the contractor appertaining to this work shall be open at all times to the department, and its representatives, and such statements and returns relative to the expenditures shall be made as are directed by the department. No change shall be required in the present methods and principles of keeping costs, provided the department finds them adequate for the determination of actual costs. All information obtained from the contractor's accounts and records shall be treated as confidential.

The actual cost shall include the following, and items similar thereto in principle:

(a) The cost of labor and materials, machinery, equipment and supplies entering into or expended in the manufacture, building, or construction of the vessel, and other direct charges such as insurance on the vessel, etc.

(b) A proper proportion of interest accrued within the taxable year on bonds or other debts or loans, contracted to meet the needs of the business and the proceeds of which have been actually used to meet such needs.

(c) A proper proportion of running expenses, including ordinary rentals, cost of repairs and maintenance, light, heat, power, insurance, management, salaries, and other indirect charges.

(d) A proper proportion of taxes of all kinds accrued during the taxable year with respect to the business or property.

(e) A proper proportion of physical losses actually sustained within the taxable year in connection with the business, including [fol. 25] losses from fire, flood, storm, riot, vandalism, any acts of God, acts of war, or other casualties, and not compensated for by insurance or otherwise, and a proper proportion of a reasonable allowance for losses and damages resulting from displacement of or delay in work contracted for prior to the date of this contract caused by or contributed to or by work under emergency conditions performed by the contractor for the department.

(f) A reasonable allowance, according to the conditions, for depreciation of values of plant and property. Exceptional depreciation of extensions, increases and additions to plant and property specially acquired for or devoted to the manufacture or erection of the work or the construction of the vessel under this contract will be accounted for in payments under the item special rentals provided for in paragraphs 2 and 3 of the Seventeenth clause of this contract.

2. Higher rates of pay for day's labor shall not be allowed, under this contract than are paid for similar work in progress in the contractor's yard, provided, that nothing herein shall be construed to prevent the contractor from assigning work in divisions or pieces at prices or rates considered reasonable according to its present practice. Payments shall be made by the department monthly within fifteen (15) days after the submission of bills to cover the approved actual cost for the previous month, as defined under items (a) to (f) inclusive, together with a sum equal to ten per cent thereof, and the special rentals for additional plant and equipment provided for in the Seventeenth clause. The reservation of $5,000 called for under the Ninth clause of this contract shall be withheld from the last of said monthly payments as shall be determined by the compensation board. The parts of the vessel paid for under the system of partial payments above specified become thereby the [fol. 26] sole property of the United States.

In the event that for any cause not due to the default of the contractor, the partial payments herein provided for shall cease the contractor shall have the right to discontinue work upon the said vessel, and shall be relieved of its liability for such discontinuance of work under the contract without prejudice to any of its rights hereunder.

3. No payments shall be made except upon bills in quadruplicate certified by the proper inspectors of the vessel, in such manner as shall be directed by the Secretary of the Navy, whose final approval of all bills thus certified shall be necessary before payment thereof.

4. All warrants for payments under this contract shall be made payable to the contractor or its order.

5. When a payment is to be made under this contract, as a condition precedent thereto, the Secretary of the Navy may, in his discretion, require evidence satisfactory to him, to be furnished by the contractor, showing what, if any, liens or rights in rem of any kind against such vessel, or her machinery, fittings, or equipment, or the material on hand for use in the construction thereof, have been or can be acquired for or on account of any work done, or any machinery, fittings, equipment, or material already incorporated as a part of said vessel, or on hand for that purpose; but it is hereby further stipulated, covenanted, and agreed, by the contractor for itself and on its own account and for and on account of all persons, firms, associations and corporations furnishing labor and materials for said vessel and this contract is upon the express condition that no lien or rights in rem of any kind shall lie or [fol. 27] attach upon or against said vessel or her machinery, fittings, or equipment, or the material therefor or any part thereof, or of either, for or on account of any work done upon or about said vessel, machinery, fittings, equipment, or materials, or of any materials furnished therefor or in connection therewith, nor for or on account of any other cause or thing or of any claim or demand of any kind, except the claims of the department.

Seventeenth. For the determination of the actual cost as defined above a "compensation board" composed of not more than six nor less than three officers of the Nevy shall be appointed by the Secretary of the Navy. This board shall ascertain, estimate, and determine the actual cost in accordance with the sixteenth clause hereof, and shall determine the proper proportions and reasonable allowances referred to therein, and the decision of said board or a majority thereof shall be binding on both parties to the contract, subject to the approval of the department. Wherever possible it will lay down in advance the methods to be followed in estimating and determining the actual cost, and where this cannot be done it will act within three months of the date of the receipt thereof on any claim submitted by the contractor. It will determine the methods to be followed by the contractor in preparing bills and by the inspectors in certifying to them, and will determine the items which must be referred for its decision.

It will determine a fair special rental to be allowed the contractor for the use of such additional plant and equipment as must be provided for and used in the carrying out of this contract, such rental to be determined monthly, so nearly as may be to recompense the contractor nor to exceed fifty per cent of the actual cost of such additional plant and equipment, when and as the expenditures there- [fol. 28] fore are made; provided, that at the close of the contract the compensation board will then estimate, ascertain, and determine the value to the contractors of such additional plant and equipment at that time, taking account of all the circumstances, such as additional use made of said additional plant and equipment during the period of the contract, the condition of the shipbuilding business, the desirability of such equipment at that time in carrying on the business, its first cost as compared with the first cost in a normal material and labor market, its replacement value at the time when said determination is being made.

In case the special rental that has been allowed from time to time during the period of the contract does not equal the difference between the first cost of said additional plant and equipment and the value as ascertained at the close of the contract for said additional plant and equipment, the department will pay to the contractor a sum equal to said difference. In case the special rental that has been allowed from time to time during the period of the contract is in excess of the difference between the first cost of said additional plant and equipment and the value as ascertained at the close of the contract, the department will deduct from the final payments and special reserve due the contractor a sum equal to said difference; provided, that no special rental shall be paid for any such additional plant and equipment whose installation shall not have been passed upon and approved by the compensation board.

Eighteenth. When all the conditions, covenants, and provisions of this contract shall have been performed and fulfilled by and on the part of the contractor, it shall be entitled, within 10 days after the filing and acceptance of its claim, to receive the said special reserve or so much thereof as it may be entitled to on the execution

[fol. 29] of a final release to the department in such form and containing such provisions as shall be approved by the Secretary of the Navy, or claims against the United States arising under or by virtue of this contract. But it is understood that matters forming elements of price or cost under this contract, when in dispute between the contractor and third persons, shall be excepted from the operation of said release: provided, however, that the contractor may at any time be required by the Secretary of the Navy to settle any such demands upon a decision of the compensation board on the matters in dispute.

Nineteenth. If any doubts or disputes arise as to the meaning of anything in the contract, drawings, plans, or specifications, or if any discrepancy appear between said drawings, plans, or specifications and this contract, the matter shall be referred to at once to the Secretary of the Navy for determination; and his decision in the premises shall be conclusive and binding upon the parties hereto: Provided, that both parties hereto shall have the right of appeal to the President of the United States.

In Witness Whereof, the respective parties hereto have hereunto set their hands and seals the day and year first above written.

Sun Shipbuilding Company. J. Howard Pew, President
Signed and sealed in the presence of Henry C. Carr. The United States, by F. D. Roosevelt, Acting Secretary of the Navy. Graham Egerton, Solicitor, as to F. D. Roosevelt, Acting Secretary of the Navy.

[fol. 30] Several Bond

(This form to be used when the surety is a corporation)

Know all men by these presents. That, we, Sun Shipbuilding Company, the City of Philadelphia, and State of Pennsylvania, principals, and Republic Casualty Company, a corporation organized under the laws of the State of Pennsylvania, and having executive offices in the City of Pittsburgh, and State of Pennsylvania, and Chicago Bonding and Insurance Company, a corporation organized under the laws of the State of Illinois, and have executive offices in the City of Chicago and State of Illinois, and London and Lancashire Indemnity Company of America, a corporation organized under the laws of the State of New York, and having executive offices in the City of New York, and State of New York, sureties, are held and firmly bound unto the United States of America, the principals, in the full and just penal sum of One hundred and forty thousand ($140,000.00) dollars, lawful money of the United States, jointly and severally with each surety as herein specified, and the said Republic Casualty Company, jointly and severally with said principal in the sum of Fifty-five thousand ($55,000.00) dollars of said penal sum and no more; and the said Chicago Bonding and Insurance Company jointly and severally with said principal in the sum of Fifty-five thousand ($55,000.00) dollars of said penal sum

and no more; and the said London and Lancashire Indemnity Company of America jointly and severally with said principals in the sum of Thirty thousand $(30,000.00) dollars of said penal sum and no more; for the payment of which respective sums, well and truly to be made to the United States, we bind ourselves, our heirs, execu-[fol. 31] tors, administrators, successors and assigns, in the manner and in the respective sums hereinbefore set forth, firmly by these presents.

The obligors herein expressly agree that, for the purpose of allowing a joint action against any or all of them, and for that purpose only, this bond shall be treated as the joint and several as well as the several obligation of these of the obligors.

The condition of this obligation is such, that if the above bounden principals Sun Shipbuilding Company shall well and truly perform and fulfill its contract, dated June 13, 1917, entered into with the United States, for construction of seagoing mine sweepers numbered 22, 23 and 24, confirming in all respects to the stipulations, covenants, and conditions of said contract, as it now exists or may be modified according to its terms, and shall promptly make payments to all persons supplying Sun Shipbuilding Company with labor and materials in the prosecution of the work provided for in aforesaid contract, then this obligation to be void and of no effect; otherwise to be and remain in full force and virtue.

[fol. 32] In Testimony Whereof, the said principals and sureties have signed, sealed and delivered this bond this tenth day of October, A. D., 1917.

Sun Shipbuilding Company, by J. Howard Pew, President. Segumacher, Secy. Republic Casualty Company, by Geo. F. Parker, Attorney in Fact. E. T. Fisger, Ivy Eberly, Chicago Bonding & Insurance Co. —— ——, Attorney in Fact. L. C. Wilson, L. B. Featherston. London and Lancashire Indemnity Company of America. Oscar J. Rickett, Attorney in Fact. W. W. Parker.

[fol. 33] II. General Traverse—Filed Dec. 21, 1922

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendant, a general traverse is entered as provided by Rule 34.

III. Argument and Submission

On May 26, 1924, this case was argued and submitted on merits by Mr. Frank E. Scott, for the plaintiff, and by Mr. Dwight E. Rorer, for the defendant.

[fol. 34] IV. **Findings of Fact, Conclusion of Law, and Opinion of the Court by Downey, J.**—Entered June 9, 1924

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

FINDINGS OF FACT

I

The plaintiff, the Sun Shipbuilding Company, was at all the times herein mentioned and is, a corporation organized and existing under the laws of the State of Pennsylvania. Beginning with the year 1916, the plaintiff constructed, owned, and operated a shipbuilding yard at Chester, Pennsylvania, comprising five similar shipbuilding ways, each adequate for the construction thereon of vessels of upwards of 12,000 D. W. tons, together with an auxiliary fabricating and engine building plant sufficient to supply the requirements of the said five shipbuilding ways, the whole being of the capacity for the efficient employment of upwards of nine thousand men.

On June 13, 1917, the plaintiff had contracts on hand for the construction of 18 vessels of 10,000 D. W. tons capacity each, according to the contracts, but of actual tonnage ranging from 10,375 to 12,130.

II

On May 16, 1917, four of plaintiff's ways were occupied by vessels under construction, but way No. 5 was unoccupied, being held for the purpose of laying thereon the keel of contract vessel No. 7, the materials for which were on hand and then being fabricated preparatory to the laying of the keel.

III

About May 16, 1917, and thereafter the Secretary of the Navy had under consideration the construction of 24 vessels known as mine sweepers, and addressed a letter to the plaintiff requesting information as to the suitability of plaintiff's plant for that purpose, but plaintiff did not desire to undertake any of this work because of the [fol. 35] schedule of ship construction which it already had on hand, and represented that the mine sweepers could be constructed in ship yards less suitable for the construction of large vessels. Following conferences upon the subject the Secretary of the Navy announced the conclusion that the early construction of these vessels was of such importance that it was deemed best to place orders for their construction with large, well-equipped yards and on or about June 12, 1917, placed with the plaintiff the following order:

"Navy Department,
"Washington, D. C., June 12, 1917.

"GENTLEMEN: Referring to your telegram of June 11, 1917, in reference to the construction of seagoing mine sweepers, the Presi-

dent hereby places with you, as an order under the provisions of the naval appropriation act of March 4, 1917, the requirement that you comply with the terms of a contract, to be signed hereafter, to construct seagoing mine sweepers Nos. 22, 23, and 24.

"You will be paid for these vessels on the basis of actual cost plus ten per cent profit.

"All detailed working plans and schedules for material of all kinds will be supplied by the Government through the Harlan & Hollingsworth Corporation, Wilmington, Delaware. The Government will likewise supply through that corporation all patterns for both hull and machinery castings; furthermore, that corporation will place orders for all material of all kinds entering into the construction of all of the 24 of these vessels which are to be constructed by various shipbuilders at this time. Such material for mine sweepers Nos. 22, 23, and 24 will be billed to you direct by the subcontractor for the material, and will be paid for by you, such payments being included in the actual cost of the vessels. You will be under no financial obligation to the Harlan & Hollingsworth Corporation. All of the charges for the services performed by them will be paid by the Government. The only material which will be supplied direct by the Government will be that listed in the specifications, and the hull auxiliaries, namely, steering gear, windlass, capstan, special towing machine, and winches, for which the Government will pay direct, and their cost will not enter into your actual cost of construction, as referred to above.

"You will be responsible for workmanship and for the most expeditious prosecution possible of the work after receipt of necessary materials, and for the time of delivery, except as affected by delivery of material, and subject to the usual contract clause permitting extension of time in case of delays due to strikes or causes beyond your control. The responsibility for suitability of and delivery of materials, and for performance of the vessels, insofar as affect by design and materials, will rest with the Government.

"Orders have been placed for the construction of other vessels of this same class with the following firms:

"Todd Shipyards Corporation, New York, N. Y.

"Standard Shipbuilding Corporation, New York, N. Y.

"Pennsylvania Shipbuilding Company, Gloucester, N. J.

"Chester Shipbuilding Company, Chester, Pa.

"The Pusey & Jones Shipbuilding Company, Wilmington, Del.

"Baltimore Dry Dock & Shipbuilding Company, Baltimore, Md.

[fol. 36] "Staten Island Shipbuilding Company, Port Richmond, N. Y.

"It is suggested that the work in connection with the construction of these vessels might be expedited and simplified if you arrange to perform certain portions of it, such as laying down in the mold loft and preparation of molds, in conjunction with such of the firms listed above as may be located in your vicinity.

"The construction of these vessels in the quickest possible time is considered by the military authorities to be of the highest importance, and work on them, and the materials for them, has been as-

signed a place in order of relative importance with other war work equal to and parallel with torpedo-boat destroyers, which gives them precedence over all other classes of naval construction, with the exception of repairs and conversion work on completed ships and work on submarine chasers. The department trusts that you will do all in your power to expedite the completion of these vessels at the earliest possible date.

"Very respectfully, Josephus Daniels, Secretary of the Navy.

"The Sun Shipbuilding Company, Finance Building, Philadelphia, Pa."

IV

At some time during the course of the negotiations between the Navy Department and the representatives of the plaintiff, from May 16, 1917, to June 12, 1917, with reference to the construction of these mine sweepers, representatives of the Secretary of the Navy directed the plaintiff to hold its way No. 5 open for the construction of three mine sweepers. Plaintiff represented that if it might be permitted to go ahead with its program as to the use of way No. 5, it could free another way in time for the mine sweepers but the representatives of the Secretary were unwilling to take any chance in this respect and insisted on No. 5 being held for the Government's vessels.

V

Subsequently the Secretary of the Navy forwarded to the plaintiff for execution a contract bearing date June 13, 1917, a copy of which is attached to plaintiff's petition herein marked Exhibit A, and is made a part hereof by reference. Said contract was not executed until some time subsequent to the date thereof but the date of its execution does not appear.

On June 19, 1917, plaintiff represented that the Alabama Dry Dock & Shipbuilding Company was willing and anxious to build four mine sweepers and asked authority to assign this contract to that company but the Secretary of the Navy, in a letter of June 22, refused to consent thereto and the plaintiff, on June 29, 1917, acknowledging receipt of the Secretary's letter, stated that it was accordingly entering order for these vessels and, as to the contract, said:

"We have gone over your form of contract for the sweepers and believe it to be fair and reasonable in every particular, save that pertaining to the demurrage on other ships, for which we have contracts. We shall, of course, expect your department to protect us [fol. 37] against our paying any and all demurrage accruing on these contracts due to the building of these mine sweepers.

"We await a formal contract from you for our execution."

It does not appear that any other contract was submitted or executed than that of date June 13, 1917, a copy of which appears as an exhibit to the petition.

VI

None of the materials to be used in the construction of the three mine sweepers was to be ordered or furnished by the plaintiff, but all such materials, including all patterns for hull and machinery castings, by the terms of the order or contract, were to be and were, in fact, ordered and supplied by the Harlan & Hollingsworth Corporation, subject to the approval of the Navy Department for delivery direct to the plaintiff. Following the said orders and directions of the Secretary of the Navy and his duly authorized agents, plaintiff's said way No. 5 was kept open and available for the construction of the three mine sweepers, but defendant and its agent, the Harlan & Hollingsworth Corporation, did not supply material sufficient to permit the laying of the keels of the first two mine sweepers until on or about October 8, 1917, and said way remained idle and unemployed between the dates June 18, 1917, and October 8, 1917, a total of 112 days. This delay in the delivery of materials was repeatedly called to the attention of the Navy Department by the plaintiff. After the material was supplied for the laying of the keels of the two mine sweepers on or about October 8, 1917, there were subsequent delays in the delivery of the necessary material for completion, and way No. 5 was occupied in said work until on or about May 30, 1918, when the last of the three vessels was launched.

A reasonable time for the occupation of said way No. 5 for the construction of the said three mine sweepers in the event the material for their construction had been promptly delivered to the plaintiff, would have been approximately 118 days. This finding is approximate only because based on estimates and a reported accomplishment in another yard. There is no basis for accurate determination of the time plaintiff would have required for the construction of these three vessels.

VII

Subsequent to the issuance of the final orders of the Navy Department, as provided in its letter of June 12, 1917, and its contract dated June 13, 1917, the plaintiff duly performed all the terms of said contract and duly completed in a good and workmanlike manner all of the work therein to be performed and delivered the three mine sweepers constructed to the satisfaction of the Navy Dpartment.

VIII

In consideration of plaintiff's due performance of said contract it was paid the sum of $1,664,390.09, but said payment did not include any compensation for certain items of claim which were made to the Navy Department as follows:

[fol. 38] (1) Compensation for the use and occupation of plaintiff's way No. 5, for the period of 228 days, being the difference between the total period of 346 days from June 18, 1917, to May 30, 1918, and the period of 118 days, during which latter period it is alleged

the mine sweepers should have been constructed, said period of 228 days comprising a period of 112 days between June 18, 1917, and October 8, 1917, during which time the way was idle awaiting material for the construction of the mine sweepers, and the period of 116 days which it is alleged was due to time lost between October 8, 1917, and May 30, 1918, on account of the delays in the delivery of material for the work.

(2) Compensation in the sum of $152,000 for amortization of war facilities or special rental which it is alleged is provided for in paragraph 1 (f) of the sixteenth clause and paragraphs 2 and 3 of the seventeenth clause of the contract of June 13, 1917.

(3) Reimbursement of the sum of $4,000.76 for the alleged proper portion of plaintiff's cost and expense for superintendents' and officers' salaries and the additional compensation of 10 per cent thereof, aggregating $4,400.84, alleged to be provided for in paragraph 16 of the contract of June 13, 1917.

(4) Compensation in the sum of $1,335.70, representing 10 per cent of the actual cost in the payment by plaintiff of retroactive wages pursuant to the decision of the shipbuilding labor adjustment board.

(5) Balance of $1,500 considered to be due the plaintiff under the contract, approved for payment by the Navy Department but payment withheld awaiting execution by the plaintiff of a final release.

IX

All of the items above enumerated from (1) to (4), inclusive, were incorporated in claims by plaintiff which were presented to and considered by the compensation board created as provided in the contract of June 13, 1917, and were by said board rejected.

During the period of the pendency before the compensation board of plaintiff's claim for 228 days time at $474.82 per day, $108,258.96, stated as "loss of earnings to Sun Shipbuilding Company account of tying up No. 5 shipway, waiting for material for laying of keel and construction of the boats on the ways," plaintiff waived "all claim arising from delay after material was received and construction started" and made claim "only for compensation for the period during which the way was held open before the receipt of the keel plates."

X

There is no averment or evidence that the compensation board in considering and acting on plaintiff's claim acted in bad faith or otherwise than in the exercise of an honest judgment.

Conclusion of Law

Upon the facts found the court concludes as matter of law that the plaintiff is entitled to recover $1,500 referred to in paragraph (5) of Finding VIII, but that otherwise it is not entitled to recover.

[fol. 39] It is therefore adjudged that plaintiff recover of and from the United States the sum of fifteen hundred dollars ($1,500).

Opinion

Downey, Judge, delivered the opinion of the court.

The plaintiff's claim is for disallowed items growing out of the placing with it by the Secretary of the Navy of an order for the construction of three vessels known as mine sweepers and a contract entered into between the parties with reference thereto.

Plaintiff had established a shipbuilding plant in 1916, and at the time that the matters herein involved were the subject of discussion, in the latter part of May and early part of June, 1917, it had at its plant five shipbuilding ways, four of which were occupied by commercial vessels under construction, and it had a number of contracts for the construction of commercial vessels, and anticipated the use of way No. 5, then vacant, for the construction of one of these, beginning about June 18.

The Secretary of the Navy, acting under authority of the President and under the provisions of the act of March 4, 1917, sub-head "Naval Emergency Fund," 39 Stat. 1192, desired to procure the speedy construction of twenty-four mine sweepers for war purposes, and conferred, either personally or by naval officers authorized to represent him, with representatives of the plaintiff with reference to the construction of three of these vessels. Plaintiff did not desire to undertake this work and insisted that it ought to be placed with small yards not equipped for the construction of large vessels, but the Secretary, because of the importance of this building program, insisted that it should be undertaken by established yards competently equipped for the work and the plaintiff was told that it must hold its then vacant way No. 5 for the construction of these naval vessels. It asked permission to go ahead with its program for the contemplated use of this way which it was anticipated would begin about June 18, and use another way for these vessels when it should be vacated, but this plan was disapproved and its way No. 5 was held as directed.

A formal order with reference to the construction of these vessels was issued to plaintiff on June 12, 1917, and this was followed by the contract, copy of which appears as an exhibit to the petition, which bears date June 13, 1917, but which it appears was executed subsequent to that date, but at a time not shown. This was a cost plus contract.

There were unanticipated delays in the furnishing of materials for these vessels by the agency of the Government to which that duty had been delegated. The first keel plates were received about September 15, but the keels of the first two of these vessels were not laid until about October 8, and until that time way No. 5 remained idle. It is because of this idle time and time subsequently alleged to have been lost by reason of delay in furnishing materials that plaintiff asserts the first item of its claim. The claim as presented was for loss of earnings "account of tying up No. 5 shipway waiting for material for laying of keel and construction of the boats on the ways," 228 days at $474.82 per day, amounting to $108,259.96, the 228 days being arrived at by taking 346 days as the total elapsed time from [fol. 10] June 18, 1917, when it is said it was planned to lay the keel

of a merchant vessel on way No. 5, to May 30, 1918, when the last of the three vessels was launched, and deducting therefrom 118 days as the time during which it is asserted this way would have been occupied in the construction of these vessels had there been no delay in furnishing materials, and, 112 days of the 228 being assigned to the period from June 18 to October 8, when the way was idle awaiting keel plates, the remaining 116 days are ascribed to delays in funishing materials after the work had commenced.

There was no time fixed for the completion of the vessels and during the time plaintiff's claims here presented were pending before the compensation board provided for in the contract plaintiff, in a communication to the board, abandoned its claims on account of delays occurring after the work commenced and asserted it only as to the 112 days during which this way was idle before the keels were laid for the first two vessels on October 8. However this claim as originally asserted is now asserted here notwithstanding this abandonment.

The theory upon which this claim as to the 112 days is here asserted in brief and argument is that the direction given to the plaintiff to hold its way No. 5 for the construction of these three naval vessels constituted a commandeering or a "taking" of that way for this preliminary period of 112 days such as entitles the plaintiff, outside of the provisions of the contract, to "just compensation" therefor. It is difficult to construe the petition as asserting this theory and in correspondence during the pendency of the claim with the compensation board the plaintiff did not contend that there was a commandeering of this way but that it was held open for this work pursuant to instructions and that it was "morally entitled to compensation" just as it "would have been legally entitled had the way been formally commandeered."

We do not take, within proper limitations, any issue with this quoted contention and, as the situation appears to us, would be inclined to award some moderate compensation, much less, however, than plaintiff claims, for this period, if it were within our province to do so, but we are of the opinion that, under the circumstances, we have no power to consider the question on its merits.

From this statement it is not to be assumed that we agree with plaintiff's contention now made that there was a commandeering of this way for this period, resulting in effect in a separation of this period from the subsequent period during which the way was in actual use in the construction of the vessels and entitling the plaintiff to "just compensation" as for a taking. Such a contention can not be regarded as well founded.

If, proceeding under the "Naval Emergency Fund" provision of the act of March 4, 1917, the Secretary of the Navy had placed an order with the plaintiff for the construction of these vessels, with which the plaintiff, without other procedure, had complied, the provisions of the act as to just compensation would have been applicable as the proper basis of settlement and, if the compensation fixed had been unsatisfactory, further claim might have been made in this court. But, with reference to the construction of the vessels,

the parties entered into a contract fixing the basis of compensation and granting broad powers with reference thereto to a "compensation [fol. 41] board" to be created for the purpose. We need not quote here the applicable provisions of that contract which may readily be found by reference.

There is some apparent indisposition to recognize this document as a contract. It is sometimes referred to as "order" and it is suggested that its signing by the plaintiff was rather a formality than a necessity, but, it is clearly a contract. Plaintiff in writing the Secretary that it was "fair and reasonable" save in one respect not here material, referred to it as a contract, in submitting its claim for the items here involved to the compensation board it referred to it as a contract, and by that action in so submitting its claims it recognized the jurisdiction of the compensation board. The apparent fact that plaintiff might have discharged its obligations under the law by complying with an order for the construction of the vessels without executing a contract, which was not required by the law, can not affect its obligations under a contract which it saw fit to execute. It may have deemed it for its own advantage to accept a proferred contract prescribing a basis of compensation, but its motive is immaterial.

Additional compensation for the use of this way during the period in question was considered by the compensation board upon the presentment of a claim therefor by the plaintiff and it was within the power of that board, under the contract, to have made an additional allowance therefor. Such an additional allowance might properly have been included by the board in the costs which it was authorized to ascertain if it had deemed the plaintiff entitled thereto.

We need not consider the basis of the board's conclusion in the matter further than to suggest that, whether right or wrong, the claim was given careful consideration and there is no averment or evidence of bad faith or failure to exercise an honest judgment. Under the circumstances we can not review the finding of the board. Sufficient applicable authorities, although there are others, are cited by Judge Hay in his opinion in Brinck, Receiver, 53 C. Cls. 170.

It is averred in the petition, after reciting the disallowance by the board, that "the plaintiff accordingly brings this suit in the Court of Claims, not being satisfied with the decision of said compensation board in denying plaintiff's claim." We find nothing in the provisions of the contract authorizing resort to this court in case of dissatisfaction with the action of the board. The contract itself, as well as the law, precludes such a contention.

What has been said is necessarily determinative of all other items of plaintiff's claim, except the item of $1,500 retained because of plaintiff's refusal to execute a final release. The item discussed is apparently the only one which furnishes any room for argument upon the question of the jurisdiction of the compensation board and our conclusion in that respect embraces them all.

The execution of a final release to entitle the plaintiff to receive the $1,500 retained but admittedly due is rendered unnecessary by

this adjudication of the rights of the parties and judgment has therefore been awarded for that amount.

Hay, Judge; Booth, Judge, and Campbell, Chief Justice, concur.

[fol. 42] V. JUDGMENT

At a Court of Claims held in the City of Washington on the Ninth day of June, A. D., 1924, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises, find in favor of the plaintiff, and do order and adjudge that the plaintiff, as aforesaid, is entitled to recover and shall have and recover of and from the United States the sum of One Thousand and Five Hundred Dollars ($1,500.00).

By the Court.

VI. PROCEEDINGS AFTER JUDGMENT

On June 24, 1924, the plaintiff filed a motion for a new trial.

On October 20, 1924, the court entered the following order on said motion:

Order

On plaintiff's motion to amend findings and for new trial it is ordered that the words "for each vessel" at the end of the fourth line in the second paragraph of Finding VI be stricken out, and that otherwise plaintiff's motion be overruled.

(NOTE.—Said correction appears on page 37 of this record.)

On October 27, 1924, the plaintiff filed a motion for leave to file an amended motion to amend findings.

On said motion, for leave to file, the Court on November 3, 1924, made the following order:

"Considered by the Court, and overruled."

[fol. 43] VII. PETITION FOR APPEAL—Filed Dec. 1, 1924

Now comes the plaintiff herein, by its attorneys, and applies to the Court for an appeal from the judgment of this Court filed herein on June 9, 1924, from which a motion for a new trial was overruled on October 20, 1924.

Respectfully submitted, Dean & Scott, Attys. for Plaintiff.

VIII. Order Allowing Appeal

It is ordered by the court this 8th day of December, 1924, that the plaintiff's application for appeal be and the same is allowed.

[fol. 44] In Court of Claims

[Title omitted]

Clerk's Certificate

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact, conclusion of law and opinion of the Court by Downey, J; of the judgment of the court; of the proceedings after the entry of judgment; of the plaintiff's application for an appeal, and of the order of the court allowing said application.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington City this 8th day of December, A. D., 1924

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IN THE

Supreme Court of the United States

No. 237.

SUN SHIPBUILDING COMPANY,
Appellant,

vs.

THE UNITED STATES,
Respondents.

BRIEF FOR APPELLANT.

FRANK E. SCOTT,
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The Munsey Building,
Washington.

October Term 1925.

SUBJECT INDEX.

	Page
TABLE OF CASES CITED	2
TEXT BOOKS CITED	4
STATUTES, RULES AND RECORDS CITED	5
REFERENCE TO REPORTED OPINION OF LOWER COURT	5
SPECIFICATION OF GROUNDS OF JURISDICTION OF THIS COURT	5
STATEMENT OF THE CASE	6
ASSIGNMENTS OF ERROR	11
ARGUMENT	13
Summary of Argument	13
First Point. Discussion of basis of just compensation under (1) the Constitution, and (2), the laws of Congress	18
Second Point. The first item of appellant's claim herein ($108,258.96) is for just compensation under the Act of March 4, 1917, as well as the 5th Amendment to the Constitution	24
Third Point. The remaining three items of appellant's claim (aggregating $157,736.36) are for expenditures and payments due under a contract (of June 13, 1917)	32
Fourth Point. Review of the Assignments of Error (see "Summary," p. 13, *infra*)	35
CONCLUSION	59
APPENDIX A. Contract creating Shipbuilding Labor Adjustment Board	62
APPENDIX B. Decision of Shipbuilding Labor Adjustment Board of February 14, 1918	65

TABLE OF CASES CITED.

	Page
Alton Ry. Co. v. Northcott (15 Ill. 49)	50
American Smelting & R. Co. v. U. S. (259 U. S. 75)	43
Beard v. Burts (95 U. S. 434)	27
Black v. Admiralty Com'rs (1 K. B. [1924] L. R. 661)	23, 60
Borough Cons. Co. v. City of N. Y. (200 N. Y. 149)	41
Boyce v. Berger (11 Neb. 399)	38
Bridge Co. v. City of St. Louis (43 Fed. 768)	56
British Westinghouse E. & M. E. Co. v. Underground E. & R. Co. [1912] (81 L. J. R. 1132)	54
Brown's Case (17 Ct. Cl. 303)	44
Brooks-Scanlon Corp. v. U. S. (265 U. S. 106)	21, 31, 60
Brush v. Fisher (70 Mich. 469)	54
Caha v. United States (152 U. S. 211)	34
Chicago Santa Fe & C. R. Co. v. Price (138 U. S. 185)	54
Church v. U. S. (143 U. S. 457)	29
City of Omaha v. Omaha W. Co. (218 U. S. 180)	35
Clark v. United States (95 U. S. 539)	45
Cook v. Foley (152 Fed. 41)	53
De Keyser's Hotel, Ltd., v. The King (88 L. J. R. 415)	19, 26
District of Col. v. Barnes (197 U. S. 146)	45
Duke v. United States (265 U. S. 568)	60
Edwards v. Hartshorn (72 Kansas 19)	58
Elliott St. Tug Co. v. Shipping Controller (1 K. B. [1922] 127)	35
Garfield & P. Coal Company v. Fitchburg R. Co. (166 Mass. 119)	43
Gardner v. Newburgh (2 Johns. Ch. 162)	19
Gearty v. Mayor of N. Y. (171 N. Y. 61)	42
Gray v. Taylor (2 Ind. App. 155)	59
Great Falls Mfg. Co. v. Garland (124 U. S. 581)	23
G., H. & S. A. R. Co. v. Henry & Dilley (65 Tex. 692)	49
Hall & Hinds, *in re* (10 L. J. C. P. 212)	55
Hamilton v. Kentucky Dist. & W. Co. (251 U. S. 146)	23
Heflebower v. U. S. (21 Ct. Cl. 237)	21

Page

Hepburn v. Griswold (8 Wall 603) 30, 31
Herbert v. De Murias (115 App. Div. [N. Y.] 453) ... 45
Herrick v. V. C. Ry. Co. (27 Vt. 673) 49
Hodgkinson v. Fernie (3 C. B. [N. S.] 189) 54
Hudson Nav. Co. v. U. S. (57 Ct. Cl. 416) 22
Hume v. U. S. (132 U. S. 406) 57

Kidwell v. B. & O. Ry. Co. (11 Gratt. 676) 49
Kihlberg v. United States (97 U. S. 398) 49
Kistler v. Ry. Co. (88 Ind. 460) 50
Learned v. Bellows (8 Vt. 79) 54
Lentilhon v. City of N. Y. (102 App. Div. 548) 42
Lewis v. Chicago, S. F. & C. Ry. Co. (49 Fed. 708) ... 47, 55

Marbury v. Madison (1 Cranch 138) 48
Marks v. Northern Pac. Co. (76 Fed. 941) 54
M. & P. Ry. Co. v. March (114 U. S. 549) 49
Mason's Case (14 Ct. Cl. 70) 21
McAvoy v. Long (13 Ill. 147) 50
Monongahela Nav. Co. v. U. S. (148 U. S. 312) .. 18, 31, 35, 38
Moran v. Schmitt (109 Mich. 282) 54

New River Collieries Co. v. U. S. (262 U. S. 341) 31, 59
Norfolk & Western Ry. Co. v. Mills & Fairfax (91 Va. 613) 53

O'Connor v. Pittsburg (18 Pa. 187) 23
Omaha v. Omaha Water Co. (218 U. S. 180) 35
Omnia Commercial Co. v. U. S. (261 U. S. 502) 23

People v. Barnes (12 Wend. [N. Y.] 492) 46
People *ex rel.* Powers v. Schneider (191 N. Y. 523) 42
Pope v. Mooney (40 Mo. 104) 46
Porter v. Muller (65 Cal. 512) 59
Powells Case (1 Ct. Cl. 400) 23
Pumpelly v. Green Bay & M. C. Co. (80 U. S. 166) 18, 22

Ripley v. U. S. (224 U. S. 695) 54
Roehm v. Horst (178 U. S. 1) 42
Rubin v. Maine S. S. Co. (51 Misc. [N. Y.] 665) 45
Rugheimer, *in re* (36 Fed. 371) 21
Scott v. U. S. (12 Wall. 443) 47
Siren, The (7 Wall. 152) 18

Page

Sinnickson v. Johnson (17 N. J. L. 129) 18
Smith v. Wetmore (167 N. Y. 234) 42
Street v. Morrison (116 N. Y. 19) 54
Sweeney v. United States (109 U. S. 618) 49

United States v. Alexander (148 U. S. 186) 22, 23
United States v. Behan (110 U. S. 338) 45
United States v. Burns (12 Wall. 246) 45
United States v. Carr (132 U. S. 644) 45
United States v. Chandler-Dunbar W. P. Co. (229 U. S. 53) 31
United States v. Clark (8 Pet. 444) 18
United States v. Eaton (144 U. S. 677) 34
United States v. Jones (109 U. S. 513) 18
United States v. St. Paul M. M. R. Co. (247 U. S. 310) 28
United States v. Weld (127 U. S. 51) 23

Wadsworth v. Livingston Co. (115 N. Y. 59) 38
Wisconsin Cent. R. Co. v. U. S. (164 U. S. 190) 45
Wood v. Chicago, etc., R. R. Co. (39 Fed. 52) 54

Text Books (and Digests) Cited.

22 Atty. Gen. *Opinion*, 194 30
37 Century Digest (Sec. 165½) 59
29 Cyc. (818, 819) 59
Langdell—*Summary of Contracts* (Sec. 33) 48
1 L. R. A. (New Series) Case Note, 1050 58
Leake on *Contracts* (1921 Ed.) 151 47
Page on *Contracts* (1920 Ed. Sec. 602) 47
Page on *Contracts* (1920 Ed. Sec. 273) 38
Ruling Case Law—*Compromise and Settlement* (p. 878) 38

Statutes and Rules Cited.

	Page
Act of March 4, 1917 (39 Stat. L. 1168)	24
Act of June 15, 1917 (40 Stat. L. 182)	23
Congressional Record (Vol. 54, Part 3, p. 2580)	28
Constitution—5th Amendment	18, 26
Defence of the Realm Acts (Eng.) 1708 to 1919	19
Emergency Legislation (U. S. 1917-1919) References	23
Judicial Code (Sec. 145; 36 Stat. L. 1138)	26
Judicial Code (Sec. 159; 36 Stat. L. 1142)	44
Judicial Code (Sec. 242; 36 Stat. L. 1157)	5
New York Code Civil Pro. (Sec. 723)	45
Rules of Court of Claims (Rule 15)	44

Reference to Reported Opinion of Lower Court.

The *findings, opinion* and *judgment* of the court below from which this appeal is taken is reported in 59 Ct. Cl. 757.

Specification of Grounds of the Jurisdiction of this Court.

This is an appeal from a judgment of the court of claims entered on June 9, 1924 (R. 27). The specific claims advanced and rulings made, by the lower court, which are the basis of this appeal, are presented in the Assignments of Error (pp. 11, 13, *infra*).

In conformity with Sections 242 and 243 of the Judicial Code (36 Stat. L. 1157), expressly conferring the Appellate jurisdiction of this Court in cases similar to this, the court of claims entered an order herein on December 8, 1924, allowing this appeal (R. 28).

STATEMENT OF THE CASE.

At the times herein mentioned the Sun Shipbuilding Company the plaintiff-appellant herein, was and is a Pennsylvania corporation. Beginning with the year 1916 the plaintiff constructed, owned and operated in the City of Chester, Pennsylvania, a large shipbuilding plant, together with the necessary auxiliary fabricating and engine building factory and yards, capable of the efficient employment of upwards of nine thousand men (R. 1, 19). The plant maintained and operated, at the time, five similar shipbuilding ways numbered consecutively from 1 to 5, each adequate for the construction thereon of vessels of more than 12,000 D. W. tons (R. 19).

On June 13, 1917, the plaintiff had on hand various contracts with responsible purchasers, for the construction in its yards of 18 vessels, ranging in their dead-weight tonnage from 10,375 to 12,130 (R. 1, 19).

On May 16, 1917, the plaintiff's shipbuilding Ways ♯1 to ♯4 inclusive, were occupied by four vessels under construction, and Way ♯5 was being held preparatory for the construction thereon of its Contract Vessel ♯7 (R. 19). At this time the material for Vessel ♯7 was on hand and passing through the fabricating plant preparatory to the laying of the keel on Way ♯5 on June 18, 1917 (R. 4, 19, 23).

On or about the date mentioned at the beginning of the preceding paragraph, May 16, 1917, the Secretary of the Navy had under consideration the construction of 24 seagoing mine sweepers, and addressed a communication to the plaintiff requesting information as to the suitability of plaintiff's yards for undertaking part of this work (R. 19). The plaintiff did not desire to undertake this additional work because of its building program as laid out for the construction of the 18 large vessels mentioned, and further because its yards were especially adapted for the construction of vessels of the larger type, all of which was made known to the Navy Department (R. 3, 19).

The efforts of the plaintiff to be relieved from undertaking this new work were unsuccessful, however, and the Secretary of the Navy, under date of June 12, 1917, issued a written order directing plaintiff to construct three of said mine sweepers,

the preliminary paragraph stating that "the President hereby places with you an order under the provisions of the Naval Appropriation Act of March 4, 1917, the requirement that you comply with the term of a contract, to be signed hereafter, to construct seagoing mine sweepers 22, 23 and 24" (R. 19, 20). In conformity with this order and under date of the succeeding day, June 13, 1917, the contract mentioned was signed, and contained a preliminary provision identical with the one above quoted that it was an order of the President under authority of the Naval Appropriation Act of March 4, 1917 (R. 8).

Both in said order of June 12, 1917, and the contract of June 13, 1917, it was specified that all patterns, plans and materials for the work would be supplied by the Navy Department through a Government agency, Harlan and Hollingsworth Corporation, Wilmington, Delaware. As expressly stated in said order, "*The responsibility for suitability of and delivery of materials,* and for performance of the vessels, in so far as affected by design and materials, *will rest with the Government*" (R. 20, 23, Finding VI), and the contract is to similar effect (R. 8, 9).

Neither the said order nor contract contained any reference to what shipbuilding way or other plant facilities of the plaintiff were to be utilized for the work of constructing these three mine sweepers. The plaintiff's obligations in this respect were expressed in the order, as follows: "You (the plaintiff) will be responsible for workmanship and for the most expeditious prosecution possible of the work *after receipt of necessary materials,* and for the time of delivery, except as affected by delivery of material * * *" (R. 20); and the provisions of the contract were to the same effect (R. 8, 9), though not in the same words.

At some time between June 11 and June 18, 1917, the plaintiff's program for laying the keel of its Contract Vessel #7 on its Way #5 on June 18, 1917, came to the attention of the Secretary of the Navy and his advisers (R. 3, 21). The plaintiff was desirous of going ahead with its plans for laying the keel of its Contract Vessel #7 and advised the Navy officials that it would be able to clear one of its remaining four ways for the construction of the mine sweepers by the time the material therefor should arrive (R. 21). After conferences on this subject, however, the Secretary overruled the plaintiff, and directed that its program

for laying the keel of its Contract Vessel #7 on June 18, 1917, be suspended and that its Way #5 be held vacant and in readiness for the building of the mine sweepers (R. 21).

Accordingly the plaintiff abandoned its plans under contract for the utilization of its Way #5 and held said way open and available for the work of the Government as directed (R. 21, 22).

Subsequently and about June 19, 1917, the plaintiff further sought to be relieved from the work on the mine sweepers and after making an independent investigation into the facilities of some smaller yards, approached the Secretary with the request that it be permitted to assign the order and contract to the Alabama Dry Dock and Shipbuilding Company, which company, as plaintiff was satisfied, was capable of doing the work, and which also was willing and anxious to do it (R. 21). This request of the plaintiff also was denied.

Notwithstanding the above, and in the sequence of events, the necessary material for the laying of the keel of the first of the three mine sweepers did not arrive in plaintiff's yards, so that its Way #5 could be utilized for the purpose of laying the keel of the first of the mine sweepers, until October 8, 1917, and the said way and its supporting facilities remained idle and unproductive during the entire period from June 18 to October 8, or 112 days (R. 22). This delay in delivery of material was continually brought to the attention of the Navy Department in an effort to have these conditions improved (R. 22). Furthermore, after October 8, 1917, when the work was begun, the Government agents, Harlan and Hollingsworth and others delayed the delivery of the necessary material for the reasonable expedition of the work, so that said Way #5 was occupied by the three mine sweepers until May 30, 1918, when the last of the three vessels was launched, a total period of 234 days after the work was commenced on October 8, 1917, or 346 days from June 18, 1917; all of which was brought to the attention of the Navy Department from time to time (R. 22). A reasonable period for the use of the Way #5 for the construction of the mine sweepers, if the necessary material had been furnished to the plaintiff for a proper expedition of the work would have been 118 days (R. 22). Accordingly, by reason of the said delays in the delivery

of material the plaintiff was deprived entirely of the earning power of its said property for a total period of 228, in excess of the 118 days reasonably required by the order and contract directing the work to be done (R. 22, 23).

Notwithstanding the above delays on the part of the Government agencies, the plaintiff on its part met all its obligations and "duly performed all the terms of said contract and duly completed in a good and workmanlike manner all of the work therein to be performed, and delivered the three mine sweepers constructed to the satisfaction of the Navy Department" (R. 22).

The said order of June 12, 1917, and the contract of June 13, 1917, provided that the plaintiff should be paid for the work on the basis of actual cost plus ten per cent for compensation (R. 20, 14), and paragraph Sixteenth of the contract sets forth in detail the basis of cost (R. 13-15). The contract further provided in clause "Seventeenth," that a "compensation board" appointed by the Secretary of the Navy should determine the "*actual cost in accordance with the Sixteenth clause hereof, and shall determine the proper proportions and reasonable allowance referred to therein*, and the decision of said board or a majority thereof shall be binding on both parties to the contract, subject to the approval of the department" (R. 16).

The claim upon which this suit is based (other than the item of $1,500 admittedly due, for which judgment was rendered by the court of claims in favor of plaintiff), consists of four items (R. 22): (a) $108,258.96 for the value of plaintiff's Way 25 for the 228 days of its unemployment between June 18, 1917, and May 30, 1918, which were in excess of the 118 days reasonably necessary for the work required by the contract, provided the plaintiff had been furnished the building material as agreed; (b) $152,000, under clause Sixteenth 1 (f), of the contract, which provides for a reasonable allowance for depreciation of value of plant and property; (c) $4,400.76 for reimbursement and compensation, including 10% of the base pay, for the proper proportion of salaries of superintendents and officers provided for by clause Sixteenth 1 (c) of the contract (R. 23), and (d) compensation in the sum of $1,335.70 for 10% of certain items of direct labor (paid as retroactive wages at the direction of the Shipbuilding Labor Adjustment Board with the approval of the

Navy Department), which item of compensation is provided for by clauses Sixteenth 1 and 1 (a) of the contract (R. 23).

The claim above outlined was considered by the "compensation board" and disallowed in its entirety (R. 23). The reasons given for the disallowance, if any, were not put in evidence by defendants before the court of claims and are not before this Court in the findings of fact, as will hereafter appear in the "Assignments of Error" (p. 11, *infra*).

The further discussion of the items of the claim and the findings and opinion of the court of claims is reserved for reference in the "Assignments of Error" at page 11, *infra*, and in the "Argument" to follow thereafter (p. 13). In the "Argument," each item will be taken up separately in the order set out in the second preceding paragraph, as follows: Item (a) for $108,258.96, at page 24; Item (b) for $152,000, at page 32; Item (c) for $4,400.76, at page 33; and Item (d) for $1,335.70, at page 33.

Subsequent to the disallowance of the said claim by the Navy Department the plaintiff duly filed its petition in the court of claims (R. 1). The petition sets forth two separate causes of action. The first is based upon the claim of $108,258.96 (Item [a] above), for just compensation, representing the value to plaintiff of its building Way #5 during the period of its unemployment as directed by the Navy Department on the authority of the Act of March 4, 1917 (R. 1). The second cause of action is for the remainder of the items, (b), (c) and (d), which are claimed to be due for work performed and compensation earned under the contract of June 13, 1917 (R. 5).

The court of claims entered judgment on June 9, 1924, disallowing the claim as sued upon, except for $1,500 admittedly due (R. 27). On June 24, 1924, the plaintiff filed a motion for a new trial, which was denied without opinion (R. 27); and on October 27, 1924, the plaintiff filed a motion for leave to file a motion to amend the findings, which likewise was denied without opinion (R. 27).

On December 8, 1924, the court of claims made an order granting this appeal (R. 28).

Assignments of Error.

1.

The court was in error in failing and refusing to find the fair and reasonable value of appellant's shipbuilding Way #5 and supporting facilities, for the period of 112 days between June 18, 1917, and October 8th, 1917, during which time the said way remained entirely unemployed under the directions of the Secretary of the Navy. (See "Second Point," p. 24; and "Fourth Point," (1) and (8), pp. 35, 51, *infra.*)

2.

The court was in error in failing and refusing to find the fair and reasonable value of the said shipbuilding way and supporting facilities for the period of 116 days between October 8, 1917, and May 30, 1918, which were in excess of the 118 days reasonably required to accomplish the work under the contract of June 13, 1917, provided the necessary material had been furnished to appellant. (See "Second Point," p. 24; and "Fourth Point," (2) and (8), pp. 36, 51, *infra.*)

3.

The court was in error in its conclusion to the effect that the appellant was bound by the provisions of the contract to set aside and hold available its shipbuilding Way #5 for the performance of the work required, and that the claim for just compensation for the value of this shipbuilding way could not properly be separated from a claim under the contract. But if the court were correct in this conclusion, it was in error in refusing to find the defendants liable in damages for breach of contract. (See "Fourth Point," (3) and (8), pp. 39, 51, *infra.*)

4.

The court was in error in its opinion that the plaintiff's petition could not be construed as pleading the claim for the requisition of the shipbuilding Way #5 as a basis for just compensation, under the Act of March 4, 1917 (R. 5). But if the petition were insufficient the court should have permitted the appellant to amend same to conform to the proof, in accordance

with the application therefor set out in the motion for a new trial (R. 27). (See "Fourth Point," (4) and (8), pp. 43, 51, *infra.*)

5.

The court was in error in failing and refusing to find what sum would constitute a reasonable allowance to plaintiff, for depreciation of values of plant and property, expressly provided for by section Sixteenth 1 (f) of the contract (R. 14). (See "Third Point," p. 32; and "Fourth Point," (5) and (8), pp. 46, 51, *infra.*)

6.

The court was in error in refusing to find that the claim of $4,400.84, including 10% of the base pay for superintendents' and officers' salaries, was an item of cost of labor and other direct charges provided for by sections Sixteenth 1-a and 1-c of the contract (R. 14). (See "Third Point," p. 32; and "Fourth Point" (6) and (8), pp. 50, 51, *infra.*)

7.

The court was in error in refusing to find that the plaintiff was entitled to receive as an item of compensation for its work the sum of $1,335.70, representing 10% of the cost of direct labor, paid as retroactive wages sanctioned by the Navy Department, which item of compensation is expressly provided for by clause Sixteenth-1, of the contract (R. 14). (See "Third Point," p. 32; and "Fourth Point," (7) and (8), p. 51, *infra.*)

8.

The court was in error under the circumstances of the case in its conclusion that the award of the Navy Compensation Board, "whether right or wrong" was binding on the parties, and that the court was without power to consider the merits of the case, when it was inclined otherwise to make the appellant an award of compensation (R. 25). (See "Fourth Point," (8), p. 51, *infra.*)

9.

The court was in error in its failure and refusal to award judgment in favor of plaintiff for such sums as should be found to be the fair value of its shipbuilding way during the period of its enforced idleness, and in addition thereto the further sum of the items arising under the provisions of the contract more particularly set out in Assignments of Error Nos. 5, 6 and 7, *supra* (p. 12). (See "Fourth Point," (9), p. 59, *infra.*)

ARGUMENT.

Summary of Argument.

First Point (p. 18, *infra*).

The 5th Amendment to the Federal Constitution asserting that private property shall not be taken for public use without just compensation is but a recognition of a long established law founded upon inherent equity. The 5th Amendment, therefore, is liberally construed to cover many cases of property taken constructively as well as actually. However, Congress may, by special legislation, provide some other basis of compensation than that recognized by the 5th Amendment, as for property injured, destroyed or expropriated, in which event compensation is to be determined in accordance with the provisions of such act as may apply.

Second Point (p. 24).

The appellant's shipbuilding Way #5 was requisitioned, though informally, yet in the manner and under circumstances as anticipated and intended to be provided for, by the Act of March 4, 1917. The first item of this claim ($108,258.96) is properly asserted therefore as a claim for just compensation under the Act mentioned, and since also there was a "taking" the claim upon this basis is guaranteed by the 5th Amendment to the Constitution.—History of the said Act in course of passage in Congress.

When possible, legislative acts should always receive an in-

terpretation which consist with principles of justice and equity.

While Article 1, Section 10 of the Constitution forbidding a State to pass laws impairing the obligation of contracts does not expressly apply to Congress, it is nevertheless recognized that Congress should respect the same principle, and acknowledge its violation as an unjust interference with private property unless compensation is provided for.

The Act in question does not specify any form by which the authority therein granted should be exercised; the Government accomplished the results intended and desired, and there is not in the case any public policy which makes necessary, or any justice to commend, a distinction between an "informal" and a "formal" requisition of the property affected.

Third Point (p. 32).

The remaining three items of appellant's claim (aggregating $157,736.36) are based upon express provisions of the contract of June 13, 1917.

The court will take judicial notice of regulations of an executive department promulgated to put into effect an Act of Congress.

Fourth Point (p. 35), Review of Assignments of Error.

Assignment ‡1 (p. 35).

During the period appellant was deprived of the use of its shipbuilding Way it is entitled to just compensation which may be measured by the productivity or earning power of the property.

Assignment ‡2 (p. 36).

The shipbuilding Way, after having been requisitioned, was entirely unemployed from June 18, 1917, to October 8, 1917 (112 days) awaiting material to begin the work required. After work was commenced on October 8th, the said way was occupied until May 30, 1918 (234 days), or 116 days more than the 118 days reasonably required for the work, which was due entirely to the default of the defend-

ants in failing to supply the necessary material for the proper expedition of the work. The period of unemployment of the way (116 days) after work was commenced may properly be regarded as a part or extension of the time the property was under requisition.

Offers of compromise which are without consideration and which are not accepted are not binding on the parties. Hence any effort to effect a settlement of these claims before the compensation board and which were not acted upon are not material.

Assignment #3 (p. 39)

The contract of June 13, 1917, did not require the appellant to set aside its shipbuilding Way #5, but if the court of claims were correct that the contract did so require, the appellant was entitled to damages for breach of contract in the same amount as would be the measure of just compensation as claimed.

Where a party breaches a contract, the other party may elect to stop work and claim anticipated profits, or he may complete performance and sue for damages as for a breach, and in the latter case he is not limited to an action for sums earned strictly under the contract. This right is not waived by completing performance.

Assignment #4 (p. 43).

The petition sets out two causes of action, the first being a claim for just compensation for the value of appellant's shipbuilding way for the 228 days which were in excess of the 118 days reasonably required for constructing the mine sweepers; and the second cause being for expenditures and amounts earned for construction work as provided in the contract. All of the facts were before the court of claims, and justified such judgment as the equities required. The court of claims is not bound by technical rules of pleading. If the court's interpretation of a statute and its application to a case differs from that of counsel the court will be justified in the protection of a litigant's rights, to grant a new trial to permit the pleadings to be framed in accordance with the court's views of the application of the statute.

Assignment ‡5 (p. 46).

The second item of appellant's claim ($152,000) for depreciation of value of plant and property is in accordance with an express payment due for expenditures made and compensation earned under the contract, and all or some substantial part of it should have been awarded as specifically provided in the contract. The compensation board was not authorized to ignore the item altogether and by so doing they misconstrued the contract and made such mistakes as to imply bad faith.

In the construction of contracts the courts will endeavor to determine the intent and understanding of the parties when the contract was made and give its true meaning its logical effect.

When the wording of a provision of an agreement is inserted by a party who is to do the act, it should be given added weight as an affirmative promise that he will do it.

When affirmative words only are used in a document (if it is necessary in order to give them some practical effect), the court must imply to them the sense that they were intended to negative and exclude all other objects and results than that affirmed.

Assignment ‡6 (p. 50).

The third item of appellant's claim is for reimbursement for proper proportion of salaries of superintendents and officers ($4,400.76) and for the purpose of determining whether the court of claims was in error, it may be assumed to have been a proper allowance under the contract, since the court below concluded that the award of the compensation board was binding in any event—"right or wrong."

Assignment ‡7 (p. 51).

The fourth item of appellant's claim ($1,335.70) for compensation for expenditures in direct labor charges (paid as retroactive wages at the direction of the Shipbuilding Labor Adjustment Board), is an item of compensation earned as expressly provided under the contract. The point mentioned

in Assignment ♯6 immediately above, that for the purpose of this appeal the amount claimed may be assumed to have been earned, is likewise applicable here.

Assignment ♯8 (p. 51).

Estimate of engineers and arbitrators whose decisions are to be final and binding may be impeached for bad faith or failure to exercise an honest judgment and also for such mistakes of fact, law, or calculation as would be the natural consequence of bad faith.

If an award is sought to be impeached for actual fraud that fact should be pleaded, but if the theory of the case is that fraud is to be implied in a legal sense from mistakes and errors that have been made, it is generally held to be sufficient to set forth the facts, showing such mistakes and not necessary expressly to plead their legal effect as indicated.

The determination of just compensation is a judicial and not an executive or legislative question.

Assignment ♯9 (p. 59).

It is to be concluded from Assignments 1 to 8 inclusive that the appellant was entitled to have the court of claims consider the case on its merits and render judgment as indicated in the "Conclusion" which follows (at p. 59).

Argument (Continued).

FIRST POINT.

A claim for just compensation for private property taken for public use, is held to be limited by the 5th Amendment to the Constitution to property taken, actually or constructively, but this is not a limitation upon some different basis of claim which may be provided by an Act of Congress.

Admittedly, the right of eminent domain by which private property may be taken for public use, is an incident of sovereignty which does not require constitutional recognition (*U. S. v. Jones,* 109 U. S. 518), and the sovereign may not be sued without his consent (*U. S. v. Clark,* 8 Pet. 444), which applies also to the sovereignty of the United States by virtue of the common law (*The Siren,* 7 Wall. 152). However, from this unquestioned power possessed by the Government, there has been a constant tendency by representatives of the executive branches of the Government, which the courts have not sanctioned, to attempt to narrow and restrict the meaning of the Fifth Amendment to the Federal Constitution (providing that private property shall not be taken for public use without just compensation), as if that guaranty were intended more as a favor, than the recognition of a substantive right.

The principle should not be so confused. The *right* of a government to take private property has always carried with it the obligation to pay for it. This is founded not only upon inherent equity, but likewise upon tradition, so that the right to take and the obligation to pay are parts of one and the same principle. As stated by this Court (*Mr. Justice* BREWER) in *Monongahela Navigation Company v. U. S.* (148 U. S. 312):

> "In the case of *Sinnickson v. Johnson,* 17 N. J. L. 129, 145, cited in the case of *Pumpelly v. Green Bay & M. Canal Co.,* 80 U. S. 13 Wall. 166, 178, it was said that, 'This power to take private property reaches back of all constitutional provisions; and it seems to have been considered a settled principle of *universal law that the

right to compensation is an incident to the exercise of that power; that the one is so inseparably connected with the other, that they may be said to exist, not as separate and distinct principles, but as parts of one and the same principle.' And in *Gardner v. Newburg*, 2 Johns. Ch. 162, *Chancellor* KENT affirmed substantially the same doctrine. *And in this there is a natural equity which commends it to every one. It in nowise detracts from the power of the public to take whatever may be necessary for its uses; while, on the other hand, it prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.*"

In line with the above quotation, the decision of the Court of Appeal in England in *De Keysers Hotel, Ltd., v. The King* (88 L. J. Ch. [1919] 415), is of especial historical interest. In that case, beginning on May 8, 1916, the War Office took over certain hotel property for occupation in the administrative work of the Royal Air Service, under the Defence of the Realm Acts of 1914. The Attorney General contended, that since no agreement was made with the owners for compensation, and the Act in question did not expressly provide for compensation, the occupation of the property was therefore an incident of the Royal prerogative, and the Government was not under any legal obligation to the owners to compensate them. The Master of the Rolls (*Sir* SWINFEN EADY), speaking for the Court of Appeal, overruled the Attorney General and reversed the High Court of Justice, saying in part as follows:

"It is urged on behalf of the Crown that in the past where lands had been occupied or used for the defence of the realm, there was no legal obligation on the part of the Crown to pay, but that commissions had been issued from time to time, to determine what payments should be made by the Crown *ex gratia*, and the case stood over from time to time to enable the records to be searched and information obtained to show (a) acts of interference by the Crown with private property in land for the purposes of the defence of the realm; (b) claims by subjects for compensation in respect of such interference (1) as a matter of right (11) as a matter of grace, and as to the basis

of such claims; (c) the manner in which such claims were dealt with, and the results thereof. *The result of the searches was that it did not appear that the Crown had ever taken the subjects' land without paying for it, and even in Stuart times I cannot trace any claim by the Crown to such a prerogative.* A considerable search in the records has been made, and the results appear in the book of 'Extracts from our Public Records.' The time covered by the search in the records might be divided into three periods—(1) before 1708; (2) between 1708 and 1798; (3) after 1798. In the first period there were instances of land being required for fortifications, but the land taken or occupied was paid for, as in 1668, when it was decided to construct two new batteries at Chatham, 'for the better security and safety of His Majesty's navy in that harbour.' * * *

* * * * *

"The second period begins in 1708. It appeared then to be fully recognized that the land of a subject could not be taken against his will, except under the provisions of an Act of Parliament. Accordingly in 1708 was passed the first of a series of acts to enable particular lands to be taken compulsorily. * * *

* * * * *

"* * * On April 5, 1798, there was passed the Statute 38 Geo. 3 c. 27. This Act recites that it is expedient that provisions should be made to procure ground which may be wanted for erecting batteries and other works which may be deemed necessary for the public service, and also to provide for the indemnity (in certain cases) of persons who may suffer in their property by measures which may be taken for the defence and security of the country. * * *

* * * * *

"The Defence Act, 1842, recites various Acts of Geo. 3, Geo. 4 and William 4, * * * for the defence and security of the realm, and that it is expedient to consolidate, amend and enlarge such powers and provisions. * * *

* * * * *

"After the outbreak of the Great War two statutes were passed in August, 1914—the Defence of the Realm Act, 1914 (4 and 5 Geo. 5, c. 29) and the Defence of the Realm (No. 2) Act (4 and 5 Geo. 5, c. 63). His Majesty in Council was thereby authorized during the continuance of the war to issue regulations for securing the pub-

lic safety and the defence of the realm, and may be such regulations also provide for the suspension of any restrictions on the acquisition or use of land, or the exercise of the power of making by-laws, or any other power under the Defense Acts, 1842 to 1875, or the Military Lands Acts, 1891 to 1903. * * *

* * * * *

"Thus, during the Great War, and while the Defence of the Realm Regulations remain in force, the power of acquiring land compulsorily (whether permanently or temporarily) under the Defence Acts is extended, and restrictions on its exercise removed, *but no power was or could be conferred by the regulations to take the land of a subject without payment. In order to secure the public safety and the defence of the realm, it may be necessary to obtain immediate possession of land, but neither the public safety nor the defence of the realm requires that the value of the subject's land or of the temporary possession of it, should be confiscated. Again, if the Executive Government is authorized under the Defence Acts to take and occupy land on paying compensation there is no necessity for the safety of the realm to take any other course, so long as any restrictions on acquiring immediate possession are removed.*"

Likewise a similar statute in the United States which provides for condemnation of property, and which fails to provide expressly for compensation to the owner will be read *in pari materia* with the 5th Amendment to the Constitution (*In re Rugheimer* [1888], 36 Fed. 371).

Furthermore, within the meaning of the foregoing principle as to the right of an owner to compensation when his property is taken for public use, there is no distinction between real and personal property (*Heflebower v. U. S.* [1886], 21 Ct. Cls. 237); and the application of the principle extends to all classes of personal property including contracts (*Brooks Scanlon Corporation v. U. S.* [1924], 265 U. S. 106).

Illustrative of the application of the 5th Amendment, and incidentally a case somewhat similar in principle to the one under consideration is *Mason's* case (1878), 14 Ct. Cl. 70. An officer of the army impressed into the service of the United States twenty-four ox teams for the transportation of supplies, and in passing upon the claim for compensation the Court said:

> "The principles of law as well as the dictates of natural justice raises an implied promise in such case to compensate the owner for the use of his property which the defendants have thus had the benefit of. It would be so in like transactions between individuals if the injured party chose to waive the tort and bring his action upon an implied assumpsit, and it is no less so when the United States are parties, since the constitution has guaranteed to all that private property shall not be taken for public use without just compensation."

And the 5th Amendment should be liberally construed (*Hudson Navigation Co. v. U. S.* [1922], 57 Ct. Cls. 416), so that there have been instances wherein damages to and destruction of private property have been held to amount to a "taking," as is stated for instance by this Court in *United States v. Alexander* (1893) (148 U. S. 186, 188):

> "Whether, under the constitutional provisions of the United States and of the several states, which declare that private property shall not be taken for public use without just compensation, it is necessary that property should be absolutely taken in the narrowest sense of that word to bring the case within the protection of the provision, is a question that has often arisen, and upon which there has not been entire uniformity of decision.
>
> " 'There may be,' said this court in the case of *Pumpelly v. Green Bay & M. Canal Co.*, 80 U. S. 13 Wall. 166 (20, 557) syllabus, 'such serious interruptions to the common and necessary use of property as will be equivalent to a taking within the meaning of the Constitution.' 'The cases which hold that remote and consequential injury to private property by reason of authorized public improvements is not taking such property for public use have *many of them gone to the utmost limit of that principle, and some beyond it, though the principle is a sound one in its proper application to many injuries so originating.' "

Despite the most liberal construction, however, which has been placed on the constitutional provision, limiting the right to compensation to cases of "taking," Congress has recognized many times that there were instances of injury and damage to property owners, arising from acts of the Government, for which there was no redress under the Fifth Amendment, but which

should be and have been remedied by special legislation, for, as stated by *Chief Justice* GIBSON in *O'Connor v. Pittsburg,* 18 Pa. 187, 190 (cited with approval in *U. S. v. Alexander,* 148 U. S. 158, 192):

> "The constitutional provision for the case of private property taken for public use extends not to the case of property injured or destroyed; but it follows not that the omission may not be supplied by ordinary legislation."

Thus many instances might be cited of Acts of Congress whereby just compensation was awarded for damages to and loss of private property in respect of which the Government would not be liable under the 5th Amendment. A few such instances by way of illustration are set forth in the footnote* below, although there are others.

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*Note. As an illustration of claims founded upon a law of Congress may be cited a class of claims for horses and vessels lost or destroyed in the military service by the Act of 1849 (9 Stat. L. 414), (see Powell's case 1 Ct. Cl. 400); a class of claims based upon judgments of the Court of Commissioners of Alabama Claims, by the Act of June 2, 1886, 24 Stat. L. 77 (see U. S. v. Weld [1888], 127 U. S. 51), and claims in favor of persons who may have been injured in their property rights, in the construction work of supplying the City of Washington with water from the Potomac River by the Act of July 15, 1882, 22 Stat. 168 (see Great Falls Manufacturing Co. v. Garland, 124 U. S. 581). For reference to Acts authorizing requisition of property 1916-1918, see Hamilton v. Kentucky Distilleries & W. Co. (1919), 251 U. S. 146-64 Law Ed. 199—footnote.

Of comparative interest also may be noted the Indemnity Act (England) 1920 (10 and 11 Geo. 5 c. 48, by S. 2, Sub-s. 1 (b), which provides, "Any person who has, otherwise than by requisition of a ship, sustained any loss or damage by reason of interference with his * * * business * * * through the exercise * * * during the war of any power under any enactment relating to the defence of the realm, shall be entitled to payment or compensation in respect of such loss or damage." For an interpretation of this statute as applied to a state of facts similar in principle to those in Omnia Commercial Company v. U. S. (1923), 261 U. S. 502, see Black v. Admiralty Commissioners, 1 K. B. (1924) L. Rep. 661. Since the Omnia case involves, likewise, similar statutes (Acts of March 4, 1917, now under consideration, and June 15, 1917), it is of interest to note the parallel reasoning and same conclusion reached by this Court and the Court of Appeal in the two cases.

SECOND POINT.

The appellant's shipbuilding Way No. 5 and supporting facilities were set aside for the Government as directed by the Secretary of the Navy. The item of the claim for the value of this way ($108,258.90) during its unemployment, not only may be based upon the Navy Appropriation Act of March 4, 1917, but also the 5th Amendment of the Constitution.

The application of the 5th Amendment to this item of the appellant's claim already has been indicated by what has been said under the "FIRST POINT" above. It will be mentioned again hereafter, under this ("SECOND") "POINT," but, beforehand, reference will be made now to the provisions of the Act of March 4, 1917, and their application to the above-mentioned item of the claim in suit.

The pertinent portion of this act, entitled an "Act making appropriations for the Naval Service for the fiscal year ending June 30, 1918," under the "Naval Emergency Fund" provision, is as follows:

> "To enable the President to secure the more economic and expeditious delivery of materials, equipment and munitions and secure the more expeditious construction of ships authorized, and for the purchase or construction of such additional torpedo boat destroyers, submarine chasers, and such other naval small craft, including air craft, guns and ammunitions for all of said vessels and air craft and for each and every purpose connected therewith, as the President may direct, to be expended at the direction and in the discretion of the President, $115,000,000, or so much thereof as may be necessary and to be immediately available.
>
> * * * * *
>
> (b) "That in time of war, or national emergency arising prior to March first, nineteen hundred and eighteen, to be determined by the President by proclamation, the President is hereby authorized and empowered, in addition to all other existing provisions of law:
>
> "First: Within the limits of the amounts appropriated therefor, to place an order with any person for such ships or war material as the necessities of the Govern-

ment, to be determined by the President, may require and which are of the nature, kind and quantity usually produced or capable of being produced by such person. Compliance with all such orders shall be obligatory on any such person to whom such order is given, and such order shall take precedence over all other orders and contracts theretofore placed with such person. If any person owning, leasing or operating any factory equipped for the building or production of ships or war material for the Navy shall refuse or fail to give to the United States such preference in the execution of such an order, or shall refuse to build, supply, furnish or manufacture the kind, quantity or quality of ships or war material so ordered at such reasonable price as shall be determined by the President, the President may take immediate possession of any factory of such person, or of any part thereof without taking possession of the entire factory, and may use the same at such times and in such manner as he may consider necessary or expedient.

"Second: Within the limit of the amounts appropriated therefor, to modify or cancel any existing contract for the building, production, or purchase of ships or war material; and if any contractor shall refuse or fail to comply with the contract as so modified the President may take immediate possession of any factory of such contractor, or any part thereof without taking possession of the entire factory, and may use the same at such times and in such manner as he may consider necessary or expedient.

"Third: To require the owner or occupier of any factory in which ships or war material are built or produced to place at the disposal of the United States the whole or any part of the output of such factory, and, within the limit of the amounts appropriated therefor, to deliver such output or parts thereof in such quantities and at such times as may be specified in the order at such reasonable price as shall be determined by the President.

"Fourth: To requisition and take over for use or operation by the Government any factory, or any part thereof, without taking possession of the entire factory, whether the United States has or has not any contract or agreement with the owner or occupier of such factory.

"That all authority granted to the President in this paragraph, to be exercised in time of national emergency, shall cease on March first, nineteen hundred and eighteen.

> "(d) That whenever the United States shall cancel or modify any contract, make use of, assume, occupy, requisition, or take over any factory or part thereof, or any ships or war material in accordance with the provisions of Paragraph (b), it shall make just compensation therefor, to be determined by the President, and if the amount thereof so determined by the President is unsatisfactory to the person entitled to receive the same, such person shall be paid fifty per centum of the amount so determined by the President, and shall be entitled to sue the United States to recover such further sum as added to said fifty per centum as shall make up such amount as will be just compensation therefor, in the manner provided for by Section Twenty-four, Paragraph Twenty, and Section One Hundred and Forty-five of the Judicial Code."

It is obvious, that the exercise of some of the powers conferred upon the President by this Act would fall within the scope of the 5th Amendment to the Constitution. For instance such would be the case if the output of a factory were taken as provided in the "Third" paragraph, and likewise if a factory or part thereof were requisitioned or taken over under the "Fourth" paragraph. On the other hand, if the President should "modify" or "cancel" a contract, that injury clearly would not be covered by the 5th Amendment.

In the application of this statute to the case under consideration, one of the questions, arising at the outset, is whether there is any importance to be attached to the form by which the purposes of the Act were accomplished. Upon this point the appellant contends that there is not any just grounds for the distinction to have been made by the court of claims between a "formal" and an "informal" requisition. It is apparent, as was the case also in the British Defence of the Realm Acts (*De Keysers Hotel, Ltd., v. The King, supra,* p. 19), that it was at least one of the purposes of this Act of March 4, to remove formalities and restrictions, ordinarily incident to the exercise of the power of eminent domain, in order to expedite and carry out all the purposes enumerated. The Act does not specify, therefore, any restrictions as to how its objects are to be accomplished, whether orally or in writing, or by physical seizure. It was regarded as sufficient if the desired results be accomplished in any way that might be necessary. In this respect the Act was alike in purpose to similar ones, as for instance those of March 3, 1863, and May 11, 1866, by which it was intended to extend protection to

all persons who might act in subordination to the military authorities. In the interpretation of these two acts as to the form of the order by which their purposes were carried out, this Court (by *Mr. Justice* STRONG) said in *Beard v. Burts* (95 U. S. 434):

> "The wood was cut for the military railroads, under military authority, and it was received by the military authorities before military operations in suppression of the rebellion had ceased. *The form of the order we regard as immaterial.* The plain purpose of the Acts of Congress was to extend protection to all persons who might act in subordination to the military authorities engaged in conducting the war."

The directions of the Secretary of the Navy, therefore, requiring appellant to set aside its shipbuilding way for the use of the Government, entitles the appellant to compensation equivalent to the value of its property not only under the paragraphs of the above Act designated "Fourth" and "(d)," but also under the 5th Amendment to the Constitution.

However, there is another application which this Act of March 4th (1917) has to this item of appellant's claim. It will be observed that by its paragraph "Second" (p. 25), the President was given power to "modify or cancel any existing contract for the building, production, or purchase of ships or war material." Accordingly when the Secretary of the Navy directed and required the appellant to abandon its program for laying the keel of its Contract Vessel #7 on Way #5, and rearrange its plans for the remaining 17 large ships then under contract and in process of construction, this order of the Secretary was the exercise of exactly the power intended to be authorized by Congress, and for which the subsequent paragraph "(d)" provides that just compensation should be paid. If any proof need be given that Congress fully understood the condition of affairs in the shipbuilding yards at the time the Statute was passed and intended to provide for the exact situation subsequently confronting the Secretary, it may be found in a portion of the debate in Congress, especially the remarks of the Chairman of the House Committee on Naval Affairs (Mr. PADGETT) in charge of the bill at the time this part of the Act first came up for consideration. It may be added parenthetically that it is customary for the Court

to refer to proposed amendments and especially to remarks of the chairman of a committee in charge of a bill in the course of its passage in Congress as an aid to its interpretation (*U. S. v. St. Paul M. M. R. Co.*, 247 U. S. 310, 318). Reference to the Congressional Record (Vol. 54, Part 3, p. 2580, *re:* H. R. 2632) will show that the following discussion took place on February 3, 1917:

> "Mr. KELLY: And so we come squarely up to this proposition, it seems to me: This Government is entitled to have such protection as we here, representing the American people, deem it wise that we should provide. But it is utter folly for us, it seems to me, under the conditions now confronting the country, to make contracts that will run over 46 months before the ships are ready.
>
> "Now the Secretary of the Navy himself has suggested a remedy in the form of some proposed legislation, and I will read the Secretary's proposition:
>
> " 'Draft of proposed provision for insertion in the naval appropriation bill giving the Navy Department authority to require private manufacturers to give preference to Government work.
>
> " 'In all cases where contracts have been made or orders placed for ships, or munitions, or material entering into the construction of ships or the making of munitions, the Secretary of the Navy is hereby authorized and empowered, when in his judgment the exigencies of the public service demand it, to require the contractor or the individual company, association or corporation, with which such order may have been placed, to give preference to the fulfillment thereof, and precedence of the work over all other work except for the Government.'
>
> *"Now, gentlemen, if we are going to have these ships there is only one way to get them. There is not labor enough of this character in the United States to complete the work for private individuals now in these yards and also complete the work for the Government inside of a period of 46 months. And, therefore, it seems to me, in justice to the people of the country at large, we ought to take steps in this bill to see to it that the protection of the American people is attended to first before other work is carried on."*

After a bill intended to carry out the above suggestion had been proposed and certain amendment offered the above debate continued as follows, at page 2586:

"Mr. MADDEN: I notice in the amendment which the gentleman proposes, there is no provision to compensate the man whose property is taken over by the Government for any loss that he may sustain by reason of the Government taking possession of that property, although there is a provision that compels him to pay excess cost that may be incurred by the Government. It does not seem to me that is fair or right.

"Mr. FITZGERALD: It is not legal either. That is more important. You cannot take a man's property without compensating him for it. * * *

* * * * *

"The gentleman from Illinois (Mr. Madden) has pointed out what may be a very serious objection, that you are proposing to take property without any provision for compensation. That cannot be done. *Now, there is another suggestion that the Government ought to consider, and that is the power of Congress to change, or to modify or to interfere with a contract already in existence.* We cannot now pass any law that adds to a contract a condition not in it, and declare it forfeited if that condition be not fulfilled.

"Mr. MANN: *Why not?*

"Mr. PADGETT: *I think Congress might do so by paying damages.*

* * * * *

"I think the limitation the gentleman has in mind is upon states and not upon Congress."

The foregoing debate is especially applicable to the facts of the case now under consideration, in the light of the opinion of this Court in *Church v. U. S.* (143 U. S. 457), in which the Court said in part:

> "Again, another guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the Court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body."

This debate which was the beginning of the "Emergency Fund" provision of the Act of March 4th, as finally adopted, shows that Congress was fully cognizant of the conditions to be met. Hence, as the wording of the Act indicates, it was in precise anticipation of the subsequent action of the Secretary in respect of the modification of appellant's existing contracts and the requisition of its shipbuilding way.

Accordingly it was expressly provided by Congress in paragraph "Second" and the subsequent clause "(d)" that if the President should modify or cancel a contract, it would constitute the basis of a just claim in favor of the person whose property was affected. In so providing Congress did no more than recognize, however, in this respect, the spirit of justice ordained in the Constitution. For, while it is true that Article 1, Section 10, of the Constitution (forbidding a State from passing any law impairing the obligation of contracts) does not expressly apply to Congress, yet that is within the spirit of this provision. As stated by *Mr. Chief Justice* CHASE in *Hepburn v. Griswold* (8 Wall. 603, 623):

> "But we think it clear that those who framed and those who adopted the Constitution intended that the spirit of this prohibition (Art. 1, Sec. 10) should pervade the entire body of legislation, and that the justice which the Constitution was ordained to establish was not thought by them to be compatible with legislation of an opposite tendency. In other words, we cannot doubt that a law not made in pursuance of an express power, which necessarily and in its direct operation impairs the obligation of contracts, is inconsistent with the spirit of the Constitution." (See Contract [1898] 22 Op. Atty. Gen. 194-10 Fed. Stat. Ann. 949.)

Thus it may be seen that, irrespective of the 5th Amendment, the first item of appellant's claim now under consideration is *doubly* provided for in the Act of March 4th. First, the claim may be predicated upon the impairment or modification of its contract (on its Vessel #7) which was at the express direction of the Secretary of the Navy, and for which compensation was to be awarded as provided in paragraphs "Second" and "(d)" of the statute (*supra*, p. 25). Secondly, a legal basis of the claim is duplicated by paragraphs "Fourth" and "(d)" by which the owner was to be compensated for the requisitioning of a part of its yard and factory. It is obvious however, that whichever basis is adopted, whether under the Constitution or either of the provisions of the Act, the appellant's loss (represented by the 228 days' idleness of its yard) is one and the same claim. If the claim should be based upon the impairment or modification of its contract (Vessel #7) and the resultant disarrangement of its other contracts, the items of damages in any event would

include the value of this Way #5 during the period of its enforced unemployment, and might properly include other items of loss which have not been and are not now claimed. The appellant, therefore, has adopted the basis which would afford the minimum to which it is justly entitled for the loss sustained, namely, the value of its specific property during its unemployment as directed by the Secretary. The equities are all in favor of the appellant. It vacated and surrendered its property, as orally directed by the Secretary. The Government received exactly what it requested and in this respect, all it could possibly have attained, even, by the most picturesque formality. There was, therefore, such requisition of the property as to be within the meaning of the statute, for in this court, "It is an established rule for the construction of statutes that the terms employed by the Legislature are not to receive an interpretation which conflicts with acknowledged principles of justice and equity, if another sense consonant with those principles, can be given to them" (*Hepburn v. Griswold, supra*, p. 30).

The court of claims has failed to make a definite finding as to the value of the appellant's said shipbuilding way (R. 22, 23). This omission, as well as the failure to make definite findings on the other items of the claim, as set out in the Assignments of Error (*supra*, p. 11), were brought to the court's attention, by a motion for a new trial, and a subsequent motion to amend the findings, but both motions were denied (R. 27).

Since, therefore, there is no definite finding of values by the court of claims, the appellant cannot ask this court to render a final judgment on this appeal. (See "CONCLUSION" below, p. 59.) For this reason it is not thought necessary or pertinent to discuss the measure of just compensation further than to say that it has been determined to be the equivalent of the property in value to the owner as of the time of the taking or the injury or the expropriation, and that it may properly be based upon either the fair market value, or the earning power of such property, for all available purposes (*Monongahela Navigation Co. v. U. S.*, 148 U. S. 312; *New River Collieries Co. v. U. S.*, 262 U. S. 321; *Brooks Scanlon Corporation v. U. S.*, 265 U. S. 106; *U. S. v. Chandler-Dunbar Water Power Co.* [1913], 229 U. S. 53 and footnote).

THIRD POINT.

The remaining three items of appellant's claim (b) $152,000, (c) $4,400.76 and (d) $1,335.70 are expressly provided for as items of cost and compensation for the actual construction of the mine sweepers, under the contract of June 13, 1917.

(b) The item claimed in the sum of $152,000 for depreciation of machinery and equipment (R. 23) is specified in the contract, as an allowable item of construction cost. By paragraph "Sixteenth-1" (R. 14) it is provided that *actual cost* shall be as defined in Section 302 of the Revenue Act of September 8, 1916 (39 Stat. 781); and paragraph "Sixteenth-1-(f)" of the contract (R. 14) reiterates, that this depreciation shall be allowed as a proper item of "cost," thus: "(f) A reasonable allowance, according to the conditions, for depreciation of value of plant and property." The pertinent part of Section 302 of the Act of September 8, 1916, is in accordance therewith as follows:

> "Sec. 302. That in computing net profits under the provisions of this title, for the purpose of the tax, there shall be allowed as deductions from the gross amount received or accrued for the taxable year from the sale or disposition of such articles manufactured within the United States, the following items:
>
> "(a) The cost of raw materials entering into the manufacture; * * *
> * * * * *
>
> "(f) *A reasonable allowance according to the conditions peculiar to each concern for amortization of the values of the buildings and machinery, account being taken of the exceptional depreciation of special plants.*"

The court of claims in its findings (R. 23) states that this item for depreciation is claimed also under clauses "Seventeenth-2" and "3" of the contract. In this, we respectfully say, the court is in error. As the findings show (R. 21) this was a Navy form contract, and these two last mentioned clauses provide liberally for exceptional depreciation in favor of a company which would have to acquire additional plant and equipment to carry out the contract. The appellant, however, already had its plant, and in

operation on other work (R. 19) and accordingly paragraph "Seventeenth-2" and "-3," of the contract does not apply.

The court of claims has declined to find that the appellant was entitled to some allowance on this item or even to find what would be a reasonable allowance if the appellant were entitled to recover (R. 23). While under the rules we cannot go behind the findings of the lower court, there is this to be said: The court of claims in its opinion (R. 26), states that because the Navy Department Compensation Board had jurisdiction to pass upon all the items of the appellant's claim, its conclusion was final and ousted the court of jurisdiction. Hence the court concluded, as stated in its opinion (R. 26), that it was unnecessary to consider this item of the claim on its merits, whatever the proof might establish. It follows, therefore, for the purpose of determining on this appeal, whether there was error by the lower court, that a reasonable allowance (if the appellant were entitled to recover), would have been the sum claimed (R. 23, 26). (See "FOURTH POINT" [#5], p. 46, *infra.*)

(c) The item of $4,400.75, including 10% of the base pay, represents a claim for the proper apportionment of cost of superintendence provided for by clause "Sixteenth-1-(c)" of the contract, which specifies as an allowable item of cost: "(c) A proper proportion of running expense, including ordinary rentals, cost of repairs and maintenance, * * * salaries, and other indirect charges" (R. 14).

The court of claims also has failed to make a finding upon this item more than to state the basis of the claim (R. 23). The disallowance of the item by the Compensation Board, however, is classed by the court along with the other items, as binding upon the appellant "whether right or wrong" (R. 26). Accordingly what has been said above, concluding "(b)" (this page), as to the sufficiency of the findings to raise the point of error by the court of claims, applies likewise here.

(d) The item of $1,335.70 is for compensation, representing 10% of the cost of direct labor which is provided for by paragraph "Sixteenth-1" and "1-(a)" of the contract (R. 14). As to this item the findings of the court below do not present the

details, but since this court will take judicial notice of regulations and formal arrangements which an Executive Department of the Government employs to carry out the express provisions of an Act of Congress (*Caha v. The United States* [1894], 152 U. S. 211) the following explanation is permissible:

The Act of March 4, 1917, among many other things empowered the President in certain respects to regulate conditions and hours of labor in the shipyards (R. 23). On December 8, 1917, the acting Secretary of the Navy and representatives of the United States Shipping Board entered into an agreement with various officials of certain Labor Unions by which there was to be appointed a "Shipbuilding Labor Adjustment Board" (Appendix A, p. 62, *infra*), and it was pursuant to an award of this Board, dated February 14, 1918 (about four months after the work on the mine sweepers had progressed), that the appellant was required* [footnote] to pay $13,357.00 to its employees or former employees as retroactive wages (Appendix B, p. 65, *infra*). It may be presumed from common knowledge that the office work in searching the records and making this expenditure was far greater than would have been required if this additional direct labor cost had been made as the work progressed.

The Navy Department was clearly inconsistent in this matter. It recognized its liability under the contract, to reimburse the appellant for the $13,357.00 as an item of direct labor, but declined to allow the 10% as compensation for the work involved and the cost to appellant of the money necessarily required to carry the adjustment sanctioned by the head of the Department into effect. (See "FOURTH POINT" [#7], p. 51, *infra*.)

*Note. "Regulations prescribed by the President and by heads of Departments, under authority granted by Congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them, and may thus have in a proper sense the force of law" (United States v. Eaton [1892], 144 U. S. 677, 688).

FOURTH POINT.

Review of the Assignments of Error.

Assignment of Error #1.

The court was in error in failing and refusing to find the fair and reasonable value of appellant's shipbuilding Way #5 and supporting facilities, for the period of 112 days between June 18, 1917, and October 8th, 1917, during which time the said way remained entirely unemployed under the directions of the Secretary of the Navy.

As will appear more particularly in the discussion of the 3rd Assignment of Error (p. 39, *infra*), the *valuation* of the appellant's shipbuilding Way during the period of its unemployment is a necessary factor for the decision of this case. This is so, whether the action of the Secretary directing that the way be set aside for the use of the Government be construed as a requisition of the way, or whether his action was, as was found to be, under the contract. If the former, the appellant is entitled to just compensation equivalent to the value of the property, and if the latter, it is entitled to damages similar in amount as for breach of contract. The result is the same, in so far as to the valuation of the Way being an essential factor for the disposition of the case, as will be further shown.

The value of this property was readily ascertainable upon a fair basis authoritatively accepted. It was a part of a live and going business and was in great demand for use by appellant in its other work. This circumstance which is proper for consideration (*City of Omaha v. Omaha Water Company*, 218 U. S. 180) leaves no room for argument of the practicability of arriving at just compensation for the property under the rule laid down in *Monongahela Navigation Co. v. U. S.* (148 U. S. 312, 328), in which this court said:

> "How shall just compensation for this lock and dam be determined? What does the full equivalent therefor demand? The *value* of the property, generally speaking, is determined by its *productiveness—the profits which its use brings to its owner.*"

To the same effect is the interpretation of the Indemnity Act in Great Britain by the Court of Appeal, in *Elliott Steam Tug Co. v. The Shipping Controller* (1922), 1 K. B. 127:

> "The loss of what the tug might reasonably and fairly be expected to earn for the applicants had she not been requisitioned, is in my opinion direct loss within the meaning of the subsection."

The purpose of the foregoing statements under this Assignment 1 is only to point out that it was quite practicable for the court of claims to have made a finding of the value of this property, which appellant claims to have been $474.82 per day (R. 23), based upon its fair earning power.

Since the court of claims has declined, however, to make a finding of value, on the theory that it is immaterial what the property was worth to the appellant (R. 25, 26) the question for the attention of this Court is whether the court of claims was in error in its conclusion of law, and should be directed to make the additional findings requested in the "CONCLUSION" hereof (p. 59).

Assignment of Error ‡2.

The court was in error in failing and refusing to find the fair and reasonable value of the said shipbuilding way and supporting facilities for the period of 116 days between October 8, 1917, and May 30, 1918, which were in excess of the 118 days reasonably required to accomplish the work under the contract of June 13, 1917, provided the necessary material had been furnished to appellant.

The period of requisition for which just compensation is claimed in the *"First Cause of Action"* (R. 5) includes this period of delay after the commencement of the work, as an extension of the time between June 18, 1917, and October 8th. when the way was entirely unoccupied. The theory underlying this presentation of the case is that the direction of the Secretary requiring the way to be set aside was the exercise of the exact power of requisition, under the circumstances correctly anticipated and provided for by Congress in paragraph "(b)-Fourth" of the Act of March 4, 1917 (*supra*, p. 25), and this entire period of expropriation of the way by the Government was one continuous period which gave rise to a just claim for

compensation expressly provided for by the Act mentioned (as well as the 5th Amendment to the Constitution).

This total period from June 18th, 1917, to May 30th, 1918, was 346 days (R. 22). Obviously, however, the appellant is not entitled to claim compensation for such portion of the 346 days as reasonably would have been required for the occupation of the way by the mine sweepers, provided the material had been duly furnished. The court of claims has found that if the Government had delivered this material as agreed, the reasonable time for the use of the way would have been 118 days (R. 22). The difference, or 228 days, therefore, is the period for which claim is made for just compensation in the *"First Cause of Action."*

What has been said above under Assignment ‡1 (*supra*, p. 35) regarding the valuation of the property prior to October 8, 1917, applies likewise to this period between October 8, 1917, and May 30, 1918, during which time the work on the three vessels was delayed for 116 days awaiting the necessary material for their completion. And the result is the same whether the claim is for just compensation or breach of contract. (See "FOURTH POINT" ‡3, p. 39, *infra.*)

Further, in connection with this Assignment it should be observed that the court of claims has stated in its opinion that during the time the appellant's claims were pending before the compensation board the appellant *"abandoned* its claims on account of delays accruing after the work commenced and asserted it only as to the 112 days during which time this way was idle before the keels were laid for the first two vessels on October 8. However, this claim as originally asserted is now asserted here notwithstanding this *abandonment"* (R. 25).

It is not clear whether the court means that appellant legally released the defendants as indicated or not. But, however that may be, the offer of compromise referred to does not detract from the merits of the case at this time. It is true the appellant made efforts to reach a settlement of the claims with the compensation board, and have the Government at least to share its losses. But these offers of compromise were without consideration and were not accepted, and hence they are not binding in any way upon the appellant. It would be unique, if the Gov-

ernment could thus acquire the "abandonment" of a substantial portion of a claim by mere negotiations for settlement, without giving anything in return (RULING CASE LAW—*"Compromise and Settlement,"* p. 878; 1 PAGE on *Contracts* [1920 ed.], Sec. 273). As stated in *Boyce v. Berger* (11 Neb. 399):

> "A parol agreement of compromise which has been executed is of equal effect with one in writing. But it will scarcely be contended that a mere verbal agreement to compromise, not founded on any consideration, or under which no right has been surrendered, possesses such validity. The *waiver* or *abandonment* of one right may be sufficient foundation for the acquisition of another. But what has the plaintiff *abandoned* in this case?"

In this connection also there is one other point in the court's opinion to which attention is respectfully called. The court refers to a communication from one of the appellant's officers or agents which indicates that the appellant was at least in doubt as to whether the *informal* requisition of the shipbuilding way by the Secretary was the same in legal effect as a *formal* requisition. The court says (R. 25), "During the pendency of the claim with the compensation board the plaintiff did not contend that there was a commandeering of this way, *but that it was held open for this work pursuant to instructions* and that it was 'morally entitled to compensation' as it 'would be legally entitled had the way been *formally* commandeered.'"

So far as may be seen the communication from which the court's quotation is made is not mentioned in the findings. If it were, it would be subject to inquiry as to whether any authority was shown to be possessed by the agent to construe the meaning of the statute in respect of the legal effect of an "informal" as compared with a "formal" requisition, so as to affect adversely the appellant's rights (*Wadsworth v. Livingston County*, 115 N. Y. Supp. 8, 18). However, it is not necessary to discuss the question of agency. This Court has held that statutes, and their application to actions of executive officials taken under them, are for the courts to construe and determine (*Monongahela Navigation Co. v. U. S.*, *supra*, p. 35), and the appellant is entitled to the full exercise of the conscience and judg-

ment of the courts, and we claim should not be prejudiced by the expressions of opinion by those who may not be presumed to know the history and application of legislative acts. "It is emphatically the *province and duty* of the judicial department to say what the law is" (*Marbury v. Madison*, 1 Cranch, at 177).

Assignment of Error #3.

The court was in error in its conclusion to the effect that the appellant was bound by the provisions of the contract to set aside and hold available its shipbuilding Way #5 for the performance of the work required, and that the claim for just compensation for the value of this shipbuilding way could not properly be separated from a claim under the contract. But if the court were correct in this conclusion, it was in error in refusing to find the defendants liable in damages for breach of contract.

It is stated in the court's opinion that the contention of the appellant, namely, that the way was requisitioned, "cannot be regarded as well founded" (R. 25). From this it may be assumed that the court was of the view that the appellant was required by the contract to set aside its Way #5 and hold it available for this work on the mine sweepers. It is not easy to see how this conclusion is justified. The contract in specifying the obligations of the appellant does not mention that any particular part of the appellant's plant or facilities should be vacated and set aside. Accordingly the contract left it to the discretion and judgment of the appellant to make the necessary arrangements to begin the construction of the mine sweepers as soon as the material therefor arrived. And as the record shows, their judgment was, (and as subsequent events proved) it was not necessary to set aside Way #5 for the due performance of this work (R. 22).

But outside the express provisions of the contract, the foregoing was obviously understood by the parties at the time. In Finding IV (R. 21) it will be seen that the direction of the Secretary did not purport to be within the provisions of the contract. Furthermore, as late as June 11, 1917 (the contract being dated the 13th following), the appellant further requested by letter that it be relieved from doing the work if possible. In the same letter appellant stated that if it was required to take

the contract it contemplated buying or building a plant for that purpose (R. 3). It is not reasonably possible, therefore, that a misunderstanding could have existed, regarding what was required of appellant under the contract.

However, this conclusion of the court of claims, that the basis of the claim as for just compensation, cannot be separated from a claim under the contract, brings up for consideration the question as to what effect this should have upon the results. If the court below had found the value of the appellant's property as claimed during the 228 days of its unemployment ($108,258.96), we then would have the circumstance of the appellant having suffered this loss due entirely to the default in the contract by the defendants, which the appellant nevertheless duly performed. Obviously, the equities are quite as much in favor of the appellant, whether the claim be based upon the contract or under the statute for just compensation. The question, then, is, what are the appellant's rights at law, upon the contract theory of the claim adopted by the lower court? The authorities support the proposition that it is entitled to assert a claim similar in amount upon the basis of a breach of contract. The various points which require consideration to lead to this result need not be separately discussed as they are all touched upon in the excerpts from a few leading cases presently to follow. (It may be mentioned that though this theory of the case was not adopted in the petition, it would have been within the province of the court of claims to have rendered judgment in accordance with the equities of the case—or in any event to have permitted the amendment of the petition upon the motion for a new trial, as will be mentioned hereafter. See p. 43, *infra.*)

We have seen that the continuous delays in the delivery of material not only for commencing the work on the mine sweepers but for their completion was repeatedly brought to the attention of the Navy Department (R. 22), but that the appellant nevertheless was required to continue to hold the way available for this work. If, then, these instructions of the Navy Department purported to be under the contract, the case is similar in principle to *Borough Construction Company v. City of New*

York, 200 N. Y. 149, in which the New York Court of Appeals says:

> "This action is brought really to recover the value of extra materials furnished and extra labor done by the respondent while constructing a large sewer under contract with the appellant in the Borough of Brooklyn. It is not brought, however, on the theory of recovering on or under the contract for such extra material or services, but is instituted and thus far has been sustained on the theory that the appellant unjustly required the respondent to furnish material and do work not covered by its contract, and *therefore committed a breach of the contract for which damages, measured by the value of such material and work may be recovered.*
>
> "The sewer which the respondent contracted to construct was a large one, the price being upwards of $800,000.00 * * *. Amongst other things it was provided (in the contract), 'To prevent all disputes and litigation, it is further agreed by and between the parties to this contract, that the chief engineer of sewers shall in all cases * * * decide every question which may arise relative to the execution of this contract on the part of the said contractor, and his estimate and decision shall be final and conclusive upon said contractor.'
>
> * * * * *
>
> "The learned counsel for the appellant with considerable insistence advances arguments applicable to an action brought to recover on contract for extra services and materials and leading to the conclusion that such recovery cannot be permitted because such materials and work were not called for or authorized in the manner prescribed by the contract. Of course, on the premises formulated by counsel on this theory, his conclusions are unimpeachable, but the answer to the entire argument is that this action does not rest on any claim for extra services or materials under the contract, *but on an alleged breach of the contract by the city and its representatives, whereby the respondent has suffered damages, and the question is whether the action can be maintained on that line.*
>
> *"I regard it as settled that it may be; that within certain limits a contractor who is ordered by the proper representatives of the municipality to furnish materials or do work as covered by his contract which the former thinks is not called for by such contract may under pro-*

test do as directed and subsequently recover damages because he has been so required, even though it should turn out that the contractor was right, and that the official had no right to call on him to furnish such materials and do such labor. Decisions of this court have so conclusively established the principle that under such circumstances the contractor may treat the conduct of the municipality acting through its representative as a breach of contract and recover damages that it is only necessary to summarize these without argument." *Gearty v. Mayor,* 171 N. Y. 61; *Lentilhon v. City of New York,* 102 App. Div. 548; *People ex rel. Powers, etc., Co. v. Schneider,* 191 N. Y. 523, cited.

In *Gearty v. Mayor, etc., of New York* (171 N. Y. 61, 71), it is stated:

"We thus have a situation where each party charges the other with breach of the contract. The City insists that the work was improperly done and the contractor urges that the Commissioners are arbitrarily and improperly exercising the powers vested in them by the contract. Questions of fact and law are thus presented, which can only be determined by a trial.

"It is very clear that the plaintiff could have stopped work as ordered by the engineer of construction and stood upon his contention that the work had been properly done, brought his action to recover for labor and materials performed and furnished under the contract and claimed his prospective profits (*Smith v. Wetmore,* 167 N. Y. 234; *Roehm v. Horst,* 178 U. S. 1).

"The important question is whether a second remedy is open to the contractor, such as is invoked in this case. The plaintiff did not choose to put himself in the attitude of refusing to obey the directions of the Commissioners, thereby assuming the position of a defaulter under a contract with the City, but preferred to perform it as best he could, accepting under the final certificate such amount as the City admitted to be due him * * *.

* * * * *

"If this were an action for extra work under the contract, such a certificate [of final completion] would be necessary, but as already pointed out, this is an action to recover damages for a breach of the contract, and the provision requiring the certificate has no application.

"We are of the opinion that either of the remedies discussed was open to the plaintiff at his election * * *."

Also this court has said by *Mr. Justice* HOLMES that a "claim for damages on the ground that the United States did not perform its part of the contract on time" is not necessarily waived by completing performance (*American Smelting & Refining Co. v. U. S.*, 259 U. S. 75, 79). See also, *Garfield & P. Coal Co. v. Fitchburg R. Co.*, 166 Mass. 119, 123.

Assignment of Error #4.

The court was in error in its opinion that the plaintiff's petition could not be construed as pleading the claim for the requisition of the shipbuilding Way #5 as a basis for just compensation, under the Act of March 4, 1917 (R. 5). But if the petition were insufficient the court should have permitted the appellant to amend same to conform to the proof, in accordance with the application therefor set out in the motion for a new trial (R. 27).

The court of claims in its opinion states that "it is difficult to construe the petition as asserting" the theory that the appellant claims just compensation for the requisitioning of the way, outside of the provisions of the contract (R. 25). We are unable to understand in what respect the court regarded the petition as insufficient upon this point. A considerate effort was made to set out in the petition the basis or theory of the case as claimed. It will be noted that the petition sets up two separate and distinct causes of action. In the first, which deals with the claim for the value of the way during its unemployment, it is alleged in paragraph VI (R. 4):

> "At or about the time said requisition order was placed with the plaintiff, *the Secretary of the Navy and his agents acting for the president, directed the plaintiff to keep one of its shipbuilding ways, designated as No. 5 free and clear of all other work in order that the same might be available for the performance of said order dated June 13, 1917;* and plaintiff, in compliance with said instructions of the Secretary of the Navy and his agents, kept said way free and clear of all other work, and the way remained idle on account of the failure of the Navy Department to supply material until October 8, 1917, the date of laying the first keel, or 112 days; and the further unreasonable delay of the Navy Department in the supply

of material caused the way to remain occupied on the work to May 30, 1918, or a total of 346 days."

This allegation is followed by paragraph VII, which states in part (R. 5):

> "By reason of the premises and the said requisition orders of June 11 and 13, 1917, and the said Act of March 4, 1917, *there arose and exists an implied promise on the part of the United States to pay as just compensation to the plaintiff for the period said way was unoccupied and unproductive, the sum of $108,258.96.*"

Furthermore, the "Second Cause of Action" (R. 5) begins by realleging by reference, the paragraphs of the "First Cause of Action" (I to IX inclusive), except the above paragraphs VI and VII, which are omitted. The "Second Cause of Action" then contains six additional paragraphs (XII to XVII) which set forth the claim under the contract of June 13, 1917, for the remaining three items (R. 6)* of the claim.

While we think the court of claims was in error in its observations regarding the petition, in any event the true state of facts and circumstances were presented to that court sufficiently for the rendition of such judgment as the equities of the case require. By its Rule 15, and Section 159 of the Judicial Code, and the practice in the court of claims, that court is not bound by strict rules of pleading customarily employed by other courts of more general jurisdiction.

> "The court has never felt bound by all the strict and technical rules of pleading incident to actions in the courts of common law or in equity." *Brown's case* (17 Ct. Cl. 303).
>
> "And the court of claims in deciding upon the rights of claimants, is not bound by any special rules of pleading" (*Mr. Justice* FIELD in *U. S. v. Burns*, 12 Wall. 246, 253, cited in *District of Columbia v. Barnes*, 197 U. S. 147, 154).

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*Note. In the petition (R. 6) the item for depreciation was claimed in the sum of $95,773.75, but testimony having been given tending to justify the allowance of $152,000, it is referred to in the findings as the latter sum (R. 23).

And this practice of the court in declining to be bound by strict rules of pleading has been applied to the extent of awarding a counterclaim in favor of the United States, although it was not pleaded. The point came before this Court (*Wisconsin Central R. Co. v. U. S.*, 164 U. S. 190, 212), and *Chief Justice* FULLER, speaking for the Court, said:

> "* * * and to each and every allegation of the petition the Government interposed a general traverse. It is now said that a counterclaim or set-off should have been pleaded, but the record does not disclose that this objection was raised below, while the *findings of fact show that the entire matter was before the court for, and received, adjudication. Moreover, it has been repeatedly held that the forms of pleading in the court of claims are not of so strict a character as to require omissions of this kind to be held fatal to the rendition of such judgment as the facts demand* (*United States v. Burns*, 79 U. S., 12 Wall. 246, 254; *Clark v. United States*, 95 U. S. 539, 543; *United States v. Behan*, 110 U. S. 338, 347; *United States v. Carr*, 132 U. S. 644, 650)."

Furthermore, as illustrative of the province of the courts in a representative State in regard to correction of pleadings, may be cited the practice in New York. By Section 723 of the N. Y. CODE OF CIVIL PROCEDURE it is provided:

> "The Court may, upon the trial, or at any other stage of the action before or after judgment, in furtherance of justice, and on such terms as it seems just, amend any process, pleading, or other proceeding * * * *by inserting an allegation material to the case, or, where the amendment does not change substantially the claim or defense, by conforming the pleading or other proceedings to the facts proved.* And in every stage of the action, the Court must disregard an error or defect in the pleadings or other proceedings, which does not affect the substantial rights of the adverse party." (See also *Rubin v. Maine SS. Co.*, 51 Misc. [N. Y.] 665; *Herbert v. DeMurias*, 115 App. Div. N. Y. 453.)

It is not known to what extent the observation of the lower court respecting the petition may have influenced it in its final conclusion. However, if it were of consequence, in any event

it would have been in accord with the established practice in other courts of general jurisdiction to have granted the appellant a new trial for which a motion was made (R. 27), in order to permit the appellant to amend its petition to conform to the proof. For instance, this practice has been sanctioned in cases similar in principle where there may be reasonable differences of opinion as to the construction or application of a statute to the state of facts upon which the suit is based.

> "But there may be questions of the proper construction of a statute or of a judicial decision, upon which very learned counsel might reasonably differ in opinion without much fault on their part, as the case was in *The People v. Barnes* (12 Wend. [N. Y.] 492), and as we think may have been the case here. The rights and interests of the parties are not wholly to be overlooked, and it would require a more rigid application than the whole circumstances would appear to justify, to bring the case within the strictness of the rule.
>
> "For all that appears, the plaintiffs may have a good cause of action; * * * and we think the ends of justice will be better subserved by granting a new trial on the condition of paying costs" (*Pope v. Mooney*, 40 Mo. 104).

Assignment of Error ‡5.

The court was in error in failing and refusing to find what sum would constitute a reasonable allowance to plaintiff, for depreciation of values of plant and property, expressly provided for by Section Sixteenth 1-(f) of the contract (R. 14).

Under clause "Sixteenth 1-(f)" of the contract (R. 14) and Section 302-(f) of the Act of September 8, 1916 (*supra*, p. 25), which is made a part of the contract by reference, the defendants were under a definite contractual obligation to compensate the appellant for the work described by a "reasonable allowance" for depreciation of plant and machinery. By clause "Seventeenth" the Compensation Board were authorized to "ascertain, estimate and determine—the *reasonable allowance* referred to," which obviously means this allowance in the "Sixteenth" clause for depreciation, as no other is mentioned in the clause to which reference is made.

Can this be said to mean that the board was thus given the power to make no allowance at all for depreciation? Within the meaning and spirit of the contract it cannot. There are several established rules for determining depreciation of a factory and plant as was here used, over a given unit of time. Somewhere in the field of the average of these rules, and no lower than the lowest percentage customarily allowed would be "reasonable." That and that only was the "Compensation Board" authorized to "ascertain, estimate and determine." Accordingly when the board made no allowance at all for depreciation they violated the contract. They misconstrued its meaning and by so doing their action was arbitrary and unreasonable, and in a legal sense constituted such a mistake as to imply bad faith (*Lewis v. Chicago S. F. & C. Ry. Co.*, 49 Fed. 708).

Certainly, it cannot be said that a shipbuilding yard and factory built up during the war was not such property and equipment as was subject to the depreciation provided for. The history of the times, the sudden depreciation of the value of ships immediately following and continuing since the war, and the fact that the Navy Department expressly recognized this circumstance in its form contract which is under consideration, would refute that contention, if made.

This was a government form contract, and the obvious purpose of the provision under consideration was to lead the party who was to do the work to expect some remuneration that was affirmative. The inference to be drawn from the circumstances of the case logically lead to the conclusion that the parties so understood it, and when such is the case the intention of the parties is controlling (LEAKE on *Contracts* [1921 ed.], 151; PAGE on *Contracts* [1920 ed.], 602). As stated by this Court in *Scott v. U. S.*, 12 Wall. 443, "It is the duty of the Court to assume the standpoint occupied by the parties when the contract was made—to let in the light of surrounding circumstances—to see as the parties saw, and to think as they must have thought in assenting to the stipulations by which they are bound." Furthermore, added weight may be given to the fact the contract in suit was prepared by the Navy Department, and the appellant was justified, therefore, in relying upon all its provisions (designat-

ing what the defendants would do) as constituting an affirmative *promise* and not a condition. As stated by Mr. LANGDELL (*Summary of Contracts,* Sec. 33):

> "Moreover, the words of such a clause will have, in fact, a different meaning, according to the party who uses them. If they are used in a contract by the party who is to do the act, *they plainly import that he binds himself to do it;* while, if they are used by the party for whose benefit the act is to be done, they fairly mean that he will require it to be done, *i. e.*, that his own obligation shall be conditional upon its being done."

If there were to be a possible alternative of no allowance for depreciation it is fair to assume that a few appropriate words to that effect would have been added, (for instance words to the effect that, *there will be a reasonable allowance, or no allowance for depreciation within the discretion of the compensation board*). But that would have made an entirely different contract, and we cannot assume it would have been signed if that alternative had been inserted. As to the contract in suit, it is obvious that unless these affirmative words (in clause 16th-1-f, that "The actual *cost shall include* * * * a reasonable allowance, according to the conditions, for depreciation of values of plant and property"), are interpreted to *exclude* any result which is negative of, or opposite to that affirmed, the entire clause is "mere surplusage," and has no operation at all. Since, however, all the terms of a contract must be assumed to have a purpose, it cannot be that the complete negative result indicated was intended by the parties. In such circumstances the rule is that when *affirmative words* only are used in a separate clause of a document, if it is necessary in order to give them some practical effect, the court must imply to them the sense that they were intended to negative and exclude all other objects and results (than that affirmed). (*Marbury v. Madison,* 1 Cranch 138, 174.) This is only the logic of the point involved, but more than that, it would not be moral for one to contract for work to be done agreeing to pay a "reasonable allowance" therefor, to be determined in accordance with a rule understood and employed by business men, and after the work was done, then to repudiate the rule and say that no allowance at all was "reasonable."

We are aware that it may be said that this reasoning leads to the conclusion that if the board had made only a nominal allowance (which was substantially nothing), it would have constituted a legal award which was final. That may be so, but for the purposes of this appeal the distinction between a nominal award and nothing at all is this: If the Compensation Board had made but a nominal allowance, it would be difficult, if not impossible, under the rules, to point out to this Court wherein the nominal allowance was contrary to the proof, and not a "reasonable allowance." But it does not require recourse to the proof to demonstrate that no allowance whatever was arbitrary and unreasonable, because it is obvious that the action of the board had the effect of eliminating entirely the sub-clause "Sixteenth (f)" from the agreement. Therefore the agreement as a whole was misconstrued and mistakenly applied. This, then, must be such a case as gave rise to the law that where an arbitrator in his award accomplishes such inequitable results and makes such mistakes as are the equivalent of, and which therefore imply bad faith, his award is not binding on the parties. (See authorities cited, p. 54, *infra.*) As is said in *G., H. & S. A. Ry. Co. v. Henry & Dilley* (65 Texas 692):

> "The parties agree, as they did in this case, that he (the engineer) shall determine as to the amount of the work done by them under the contract, not that he shall make a different contract for them. He decides under the *legal* construction of the contract, not upon such construction as he may choose to give it. *He is not made the arbitrator, to whom is to be referred difference as to the meaning of the contract, and he cannot adopt rules of measurement that it does not authorize.*
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> * * * * *
>
> "* * * None of the decisions to which we are referred by appellant go so far as to allow the engineer to vary the contract, or to decide as to its meaning and intent (*M. & P. Ry. Co. v. March, supra,* 114 U. S. 549; *Herrick v. V. C. Ry. Co.*, 27 Vt. 673; *Kidwell v. B. & O. Ry. Co.*, 11 Gratt. 676; *Kihlberg v. United States*, 97 U. S. 398; *Sweeney v. United States*, 109 U. S. 618).
>
> *"There are decisions, however, to the effect that where the engineer is the party whose estimates are to govern, he must not base them upon an erroneous view of the*

contract; if so, his estimate will not conclude the parties (McAvoy v. Long, 13 Ill. 147; *Alton Ry. Co. v. Northcott,* 15 Ill. 49; *Kistler v. Ry. Co.,* 88 Ind. 460)."

The application of the opinion of the court in the *Henry and Dilley* case to the facts of the case under consideration is this: The contract of June 13, 1917, provides that the compensation board "*shall* ascertain, estimate, and determine the actual cost *in accordance with the sixteenth clause hereof,* and *shall* determine the proper proportions and reasonable allowances referred to therein" (R. 16). If, therefore, under the true legal construction of the contract the appellant was entitled (1) to an affirmative award of some "reasonable allowance" for depreciation, (2) to a proper proportion of salaries of officers, and (3) to the item of $1,335.70 (which is admittedly 10% of a sum of money paid out as retroactive wages to employees), then, the compensation board had no authority to make an award which was clearly repugnant to this true interpretation of the agreement. (See cases cited, pp. 54, 55, 56, *infra.*) Likewise the same point applies to item (a) of appellant's claim (p. 9, *supra,* for the value of the shipbuilding Way during its unemployment), provided, this court should agree with the court of claims that it may be based only upon breach of contract, and not for just compensation under the Act of March 4, 1917. If, however, this item of the claim is properly one for just compensation under the Act of March 4, as claimed, it is obvious that the question involved is judicial, and the determination of the board is not final in any event. (See p. 59, *infra.*)

We do not think that the case at hand requires especial reliance upon the rule, that if an arbitrator or referee is an employee of one of the parties, he is held to a high standard of diligence and good faith (*Edwards v. Hartshorn,* p. 58, *infra*), but it would seem that this rule would have an application particularly to any case in which the power of eminent domain was exercised throughout the entire transactions, and where the party who was to do the work was obviously without choice in the selection of the arbitrator.

Assignment of Error ‡6.

The court was in error in refusing to find that the claim of $4,400.84, including 10% of the base pay for superintendents' and officers' salaries, was an item of cost of labor and other direct charges provided for by sections Sixteenth 1-a and 1-c of the contract (R. 14).

This error of which complaint is made is explained in the remarks above concerning the basis of this item of the claim (*supra*, p. 33).

Assignment of Error #7.

The court was in error in refusing to find that the plaintiff was entitled to receive as an item of compensation for its work the sum of $1,335.70, representing 10% of the cost of direct labor, paid as retroactive wages sanctioned by the Navy Department, which item of compensation is expressly provided for by clause Sixteenth-1 of the contract (R. 14).

Also the error claimed in this assignment is explained above in the outline of the basis of this item of the claim (*supra*, p. 33). As pointed out there, the orders of the Labor Adjustment Board, with which the Navy Department was co-operating, required the appellant to revert to its time sheets and other records, and expend of its capital $13,357.00 in the payment of retroactive wages, for past work on the mine sweepers. This outlay of capital and labor was recognized by the Navy Department as direct labor cost under the contract to the extent only of reimbursing the appellant for the actual money paid to the laborers. But the 10% of this expenditure to which appellant was entitled under the contract as compensation for this part of direct cost was disallowed. This, it is contended, is a clear case of a mistake on the part of the compensation board in the construction of the contract.

Assignment of Error #8.

The court was in error under the circumstances of the case in its conclusion that the award of the Navy Compensation Board, "whether right or wrong," was binding on the parties, and that the court was without power to consider the merits of the case when it was inclined otherwise to make the appellant an award of compensation.

This Assignment of Error arises primarily in connection with that portion of the court's opinion which is as follows (R. 26):

> *"We need not consider the basis of the board's conclusion in the matter further than to suggest that, whether right or wrong, the claim was given careful consideration and there is no averment or evidence of bad faith or failure to exercise an honest judgment. Under the circumstances we cannot review the finding of the board."*

If this were a correct statement of the law on the subject, it is obvious that a party would have no escape from an award of an arbitrator, however capricious and arbitrary his action might be, or however unjust and erroneous his award, unless the party injured could prove intentional fraud on the part of the arbitrator. Furthermore, such a rule would be of extremely limited value in practical business affairs. In the first place comparatively few arbitrators chosen by parties to adjust differences are intentionally dishonest; and secondly, in the relatively small number of cases in which they are, it would be impossible to prove the actual fraud (*dolus malus*) except possibly in rare cases. On the other hand, there have been many instances of "arbitrary," "mistaken," "unreasonable" or "capricious" viewpoints, and negligence on the part of an arbitrator, resulting in *mistakes* of law, or facts, or calculations, which were so unjust and inequitable that the results to the injured party were quite as bad or worse than if intentional fraud were committed. Accordingly the courts have extended the circumstances which the court of claims has not mentioned and under which an award may be set aside to include not only intentional fraud, but also such mistakes of law or fact, which, though innocently or ignorantly made, are such as to imply dishonesty and bad faith in a legal sense. As thus extended and as recognized by this Court and the courts throughout the country this rule of law affords a basis of relief which is of practical value, for it is oftentimes possible to prove that a party is unjustly or unlawfully injured by substantial or gross mistakes on the part of an engineer or arbitrator chosen by the parties.

The court of claims has declined to consider this case on its merits because as to the award of the compensation board "there is no *averment* or *evidence* of bad faith or failure to exercise an honest judgment." First, as to the question of "averment" or pleading, what the court says is so, and the reason for it is this:

We do not say, for we do not believe, that the compensation board or the navy officials who conducted the transactions involved herein were intentionally dishonest. But we hold that they were mistaken in the interpretation of the contract and the construction and application of the statute and that the appellant, therefore, has the right upon that ground to invoke the jurisdiction of the courts. (See *Norfolk & Western R. R. Co. v. Mills and Fairfax*, 91 Va. 613.) Secondly, both as to the pleading and the evidence, the error into which it is contended the court has fallen is discussed in *Cook v. Foley* (152 Fed. 41, Circuit Court of Appeals, Eighth Circuit). The case was before the court involving the correctness of the following charge to the jury by the trial court:

> "Now, it is for you, gentlemen of the jury, to determine in the case what the amount of these different materials was, and what the different classifications were. If you are satisfied that this work of measurement and of classification was honestly performed by these engineers, * * * if you are satisfied that these men did this work honestly, * * * it would substantially end the case."

With respect to this charge, the Circuit Court of Appeals said:

> "If the trial proceeded from a correct view of the plaintiff's contract, this portion of the charge was erroneous for that it accorded to the testimony of the engineers of the railway company and the estimates made by them of the work done by the plaintiffs undue probative force and effect.
>
> "In effect, it charged the jury, if the estimates were honestly made by the engineers of the railway company, as shown by their testimony, that ended plaintiff's case. In other words, it made the accuracy of the estimates of measurements and classifications of the engineers of no moment, but their honesty the sole test.
>
> * * * * *
>
> "Final estimates made by engineers in pursuance of such a contract are in legal effect an award made by arbitrators, and are final and conclusive in the absence of fraud or such gross mistakes as to imply bad faith or a failure to exercise an honest judgment."

To the same effect are the decisions of this Court and the courts

generally, as may be noted in the following examples. In *Chicago, Santa Fe & C. R. Co. v. Price* (138 U. S. 185, 193), by *Mr. Justice* HARLAN, it is said:

> "They chose to risk his estimates, and rely upon their right, which the law presumes they did not intend to waive, to demand that the engineers should at all times, and in respect to every matter submitted to his determination exercise an honest judgment, and commit no such mistakes as, under all the circumstances, would imply bad faith."

See also *Wood v. Railroad Co.*, 39 Fed. 52, and citations; *Street v. Morrison*, 116 N. Y. 19; *Brush v. Fisher*, 70 Mich. 469; *Marks v. Northern Pacific Co.*, 76 Fed. 941; *Ripley v. U. S.*, 224 U. S. 695.

Furthermore, an error of law is of equal consequence with an error of fact. In *Learned v. Bellows* (8 Vt. 79 [Syllabus]) it is said:

> "Reports of referees are not to be set aside for every circumstantial error, but only where they adopt a rule of action *and misapply it*, and in this respect it is immaterial whether it be a *rule of law or of equity or of arithmetic.*"

So it is in England, as stated by Lord HALDANE, L. C., in *British Westinghouse Elec. and Mfg. Co. v. Underground Elec. R. Co.* (1912), 81 L. J. R. 1132:

> "I am of the opinion that the doctrine of *Hodgkinson v. Fernie* (1857, 3 C. B. [N. S.] 189), to the effect that where an error of law appears on the face of the award, the error can be reviewed, is a well established part of the law of the land."

And such "mistakes" may be shown by an arbitrator's refusal to act in accordance with the arbitration clause of a contract (*Moran v. Schmitt*, 109 Mich. 282, 292). They may also be shown by the negligence of the arbitrator or referee in the performance of his duties.

> "We consider the mistake in the present case to be a mere clerical *mistake*, by which the arbitrators have not expressed, in the copy of the award delivered out, the intention of their own minds, but one widely different.

> At the same time, the *mistake*, as a matter of carelessness, is so gross as to amount, though not in a moral point of view, yet in the judicial sense of that word, to misconduct, on the part of the arbitrators. *Lata culpa, et crassa negligentia*, both by the civil law (* * *) and our own, approximate to and cannot be distinguished from *dolus malus* or misconduct. We think we do not extend the jurisdiction of the court beyond its limits when we give relief under such peculiar circumstances by holding this to fall within the power of the court to give relief in cases of arbitration" (*In re Hall and Hinds* [1841], 10 L. J. C. P. at 212).

Upon an examination of the foregoing cases which contain the several statements in which the term "mistake" is employed, the inquiry naturally arises as to a proper definition of that term for purposes of practical application. A case, which, while it deals with the term as applied to the particular subject at hand, yet is so comprehensive as to afford a practical view of the entire subject is *Lewis v. Chicago, S. F. & C. Ry. Co.* (49 Fed. 708, 710). The suit was to recover a balance due for grading a portion of defendant's railroad bed. The contract provided that the decision of the engineer in certain respects should be final and conclusive. In regard to the conclusiveness of the engineer's decision the court said:

> "The estimate (engineers') may be impeached for fraud; that is to say, it may be shown that the engineers in charge intentionally underestimated or overestimated the work. It may also be impeached by proof of gross errors in the measurements and calculations. If the evidence shows such errors, it either creates the presumption of fraud, or warrants the conclusion that the engineers did not exercise that degree of care, skill and good faith in the discharge of their duty that the law exacts; *and in either event the court will disregard the estimate so far as is necessary to do substantial justice. The meaning of the word 'mistake,' as above employed, must be carefully defined.*
>
> "(a) The court will relieve against *mistakes* in measurements and calculations that are apparent on the face of the estimate, or that are clearly proven, though not so apparent.

"(b) If it is satisfactorily shown that the engineers failed through oversight, to measure or estimate any particular part of the work, the court will grant relief as to such *mistakes.*

"(c) If it appears that the engineers in charge put a wrong construction on any provision of the contract, the court will correct any substantial errors resulting from such *mistake,* for the reason that the parties did not make the decision of the engineers as to the proper interpretation of the contract final and conclusive. *It is the province of the court to construe the agreement, Bridge Co. v. City of St. Louis,* 43 Fed. 768.

"(d) But in determining the kind of material found in the several cuts, the engineers were called upon to exercise their judgment. That was a matter, as the contract in substance recites, which involved the exercise of special skill and attention as the work progressed, and for that reason the parties selected an umpire, by whose judgment they agreed to be bound (*Ranger v. Railway Co.,* Eng. Ry. Cas. 1, 13 Sim. 368). The court will not undertake to revise the decision of the engineer on questions of that character if it appears that he acted in good faith. The utmost it can do is to correct errors of classification that may have resulted from an erroneous interpretation of the contract."

In *Bridge (King) Co. v. City of St. Louis,* 43 Fed. 768, it is stated by the court in its opinion:

"*Second.* The next question is whether the eighth clause of the contract gave the street commissioner such broad powers as an arbitrator, that his decision on making the final estimate that the plaintiff was in law liable for liquidated damages, is conclusive between the parties, although manifestly erroneous. This question must be answered in the negative. *The contract made the decision of the street commissioner conclusive as to all questions concerning the amount of work done, provided he acted in good faith, and with reasonable care and circumspection. With the same reservations that he acted in good faith and with reasonable care, it also made his decisions final as to all questions whether the work was done in accordance with the drawings and specifications,* and was fully up to the standard of excellence mentioned therein. These were all questions of fact, depending for

their correct solution on professional knowledge and skill; and the parties might reasonably and lawfully submit them to the determination of an arbitrator, and agree to be bound by his decision (*Wood v. Railway Co.*, 39 Fed. Rep. 52, and citations).

"But the question which the street commissioner undertook to decide was purely a question of law, as to the effect which the failure of the city to have the bridge piers completed within one week and ten months after the notice was served, had upon its right to demand liquidated damages. *I am satisfied that the contract, properly construed, did not commit that question to the determination of the street commissioner; it was wholly outside of his jurisdiction.*"

The inquiry arises also in connection with the above portion of the court of claims' opinion (*supra*, p. 51), as to the necessity of an allegation in the petition that there was actual or constructive fraud,* or failure to exercise an honest judgment on the part of the compensation board. We may assume that if it is desired to set aside an award upon the single ground that it is tainted with intentional dishonesty by the arbitrator, that fact would have to be pleaded in order that proof might be admissible to sustain it. Obviously, however, that is not the case here, for we do not claim that there was actual or intentional fraud committed. The question, then, is, is it necessary in a case where the contract has been fully performed and it is claimed that the mistakes of law and fact by an arbitrator are such that the award is not binding, to plead expressly this conclusion? In other words, is it necessary to insert a phrase in the petition, to the effect that the *foregoing facts alleged, constituted such mistakes as to imply bad faith on the part of the arbitrator?* Doubtless it will be admitted that such an allegation is more of a conclusion of law than a statement of fact, and it might be argued by inference from many cases that it is not necessary to allege in the pleadings the conclusion suggested. Furthermore, the cases holding that the court of claims is governed substantially by the facts proved rather than technical rules are in point (*supra*, p. 45). However, a case which deals with the subject ex-

*Note. For a definition of actual and constructive fraud, see Hume v. U. S., 132 U. S. 406, opinion by Fuller, C. J.

pressly, and which seems determinative of the point even in courts of general jurisdiction, is as follows:

> *"It is true that the pleading does not state in express terms that fraud was committed by the engineers; but facts as to inefficiency, negligence, and gross mistakes are related, which in themselves are sufficient to constitute bad faith, and invalidate the estimates of the chief engineer. Little strength would have been given the pleading by adding a conclusion that the facts stated constituted bad faith.* If the estimates had been fairly made, they would have been binding; but when not fairly made and there are mistakes so gross as to amount to fraud on the plaintiff's rights, the estimates and decision of the chief engineer may be ignored, and a recovery of the contract price had in an action at law. Although the equitable elements of mistake and fraud may be involved, the case is essentially one at law for the recovery of money under the contract; and hence a jury was properly allowed.
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> * * * * *
>
> "Enough appears in the testimony to warrant the inference that the so-called final estimates were not fairly and honestly made, and the discrepancies are such as to show palpable mistakes and utter disregard to the rights of Hartshorn. *The fact that the chief engineer, who was to classify, measure and make final estimates, was an employee of the defendant, does not in itself weaken the force of his decision, but the law does require of persons so situated the utmost diligence and good faith,* and the testimony offered in behalf of the plaintiff tends rather to show inefficiency and negligence on his part instead of fair and honest performance of duty" (*Edwards v. Hartshorn, 72* Kansas 19).
>
> "The rule stated in *Edwards v. Hartshorn* (*72* Kan. 19), that the contractor will not be bound by the decision of an architect, engineer, or other person appointed as umpire by the contract, in case of fraud or mistake so great as to imply bad faith on his part, seems to be universally accepted" (authorities cited). *Case note,* 1 L. R. A. (new series) 1050.

One additional point involved in the above quoted portion of the court's opinion (p. 51) should be mentioned. As previously stated, it is believed clear that the directions of the Secretary of the Navy requiring the appellant to modify or change its ex-

isting contracts and to set aside its shipbuilding way and give preference to the government work, was the exercise of the exact authority which he requested Congress to give him, and which they did give in the Act of March 4 (1917). All these requirements were not put in the contract and it cannot be construed as covering it. The determination of *just compensation* as provided for in the Act *is involved,* therefore, and this is a judicial question, upon which the action of the executive branch of the government is not final and binding (*United States v. New River Collieries Co.,* 262 U. S. 341).

Assignment of Error ♯9.

The court was in error in its failure and refusal to award judgment in favor of plaintiff for such sums as should be found to be the fair value of its shipbuilding way during the period of its enforced idleness, and in addition thereto the further sum of the items arising under the provisions of the contract more particularly set out in Assignments of Error Nos. 5, 6 and 7 (supra, p. 12).

This Assignment is obviously dependent upon the decision in the preceding Assignments. If the court was in error as contended in preceding Assignments 1 to 8 inclusive, it would follow that the appellant was entitled to judgment upon the basis indicated in the "Conclusion" immediately to follow.

CONCLUSION.

If what has been said is approved, it will appear that the findings of the court of claims are insufficient for the determination of all the issues raised by the petition, in support of which evidence was introduced. When the findings are thus incomplete, a decision thereon is against the law and a new trial should be granted (*Gray v. Taylor,* 2 Ind. App. 155; *Porter v. Muller,* 65 Cal. 512; 37 *Cent. Digest,* Sec. 165 1/2; 29 *Cyc.* 818, 819).

Under these circumstances it is the practice of this Court to require findings to be amended or additional findings to be made in order that the law applying to the case may be given effect (*Brooks-Scanlon Corporation v. U. S.* [1924], 265 U. S. 106;

Duke v. United States [1924], 265 U. S. 568).* Accordingly, upon the record in the case the Court is respectfully asked to set aside the judgment of the court of claims and to remand the cause to that court for the purpose, among others, to elicit certain additional findings of fact, in accordance with the following directions:

1. To find (a) the fair and reasonable value of the plaintiff's shipbuilding Way #5 for the period of 112 days from June 18, 1917, to October 8th, 1917, during which time the said way was held idle and available for the use of the Government, at the direction of the Navy Department; (b) the fair and reasonable value of the said way for the period of 116 days between October 8, 1917, and May 30, 1917, which were in excess of the 118 days, reasonably required for the work under the contract of June 13, 1917, provided the necessary material had been duly delivered to the plaintiff; (c) what sum would constitute a reasonable allowance for depreciation of values of plaintiff's plant and property within the meaning of clause Sixteenth, subparagraph 1 (f) of the contract of June 13, 1917, and Section 302 of the revenue bill of September 8th, 1916, mentioned in said contract (R. 14); and (d) whether the whole or any part of the items of $4,400.84, including 10% of the base expenditure for salaries of superintendents and officers and $1,335.70, representing 10% of retroactive wages for labor, were items of cost of labor and other direct charges, and/or 10% thereof provided for by clause Sixteenth of the contract (R. 14).

2. To take further evidence, if need be, on which to base such additional findings.

3. To qualify or alter any of the existing findings, if necessary to bring them and the additional findings into accord.

4. To permit the amendment of the petition, if necessary, in order that same may be made to conform to the proof.

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*Note. Such also is the practice in the Court of Appeal in Great Britain (Black v. Admiralty Commissioners [1924], 1 K. B. L. R. 661, 665).

5. In the event the question designated "(d)" in the above paragraph 1 of this direction, is answered in the affirmative, to render judgment on all the findings when completed, in favor of the plaintiff for the sum of the amounts so found as directed in paragraph 1 hereof, otherwise to render judgment in favor of plaintiff for the sum of the items under the directions designated "(a)," "(b)" and "(c)" in said paragraph, together with interest, as by law required, on such sums as shall be found due.

Respectfully submitted,

FRANK E. SCOTT,
Attorney for Appellant.

APPENDIX A.

**Memorandum for the Adjustment of Wages, Hours and Conditions of Labor in Shipbuilding Plants, December 8, 1917.*

When disputes arise concerning wages, hours, and conditions of labor in the construction or repair of shipbuilding plants, or of ships in shipyards, under the United States Shipping Board Emergency Fleet Corporation, or under said Shipping Board, or under contract with said corporation, or with said board, or if, questions coming under the jurisdiction of the board arise with reference to such construction in a private plant in which construction is also being carried on for the Navy Department, and attempts at mediation or conciliation between employers and employees have failed, the adjustment of such disputes shall be referred to an adjustment board of three persons, hereinafter called the "Board," one to be appointed jointly by the said corporation and the Navy Department, one to represent the public and to be appointed by the President of the United States, and one to represent labor, to be appointed by Samuel Gompers, president of the American Federation of Labor. It is understood, however, that this memorandum shall in no wise serve as a precedent for procedure in Government plants under the War or Navy Departments, except as may be authorized by such departments.

The plants where such construction is being carried on shall be geographically districted by the Board. In each district, the contractors in whose plants such construction is being carried on, and the representatives of such international labor organizations as have members engaged in such production or construction in such plants, and are selected for the purpose by the labor member of the Board, shall be called upon, under conditions to be laid down by it, to agree upon a person or persons who shall act under the direction of the Board as examiner or examiners in such district. If the Board deems it advisable itself to name an examiner or examiners, or if the representatives of the contractors and of the labor organization do not agree, then the Board shall by unanimous action select a person or persons for such position. The examiner shall be subject to removal by the Board at any time by majority vote. It shall be the duty of the district officer of the United States Shipping Board Emergency

*Extract from "Codification of the Shipbuilding Labor Adjustment Board Awards, Decisions, and Authorizations, With Amendments and Special Rulings Annotated."—Government Printing Office, 1921. A copy of this document is on file with the record in this case #B-317, court of claims.

Fleet Corporation to report promptly to the Board and to the examiner of the district, if such examiner shall have been appointed, any dispute with reference to wages, hours or conditions of labor which he is unable to adjust satisfactorily to the principals concerned.

As basic standards where such construction is being carried on, the Board shall use the wage rate prevailing in the district in which such plant or plants are located, provided such wage rates have been established through agreements between employer and employees and are admitted to be equitable. Consideration shall be given by the Board to any circumstances arising after such wages, hours or conditions were established, and which may seem to call for changes in wages, hours or conditions. Where no such agreements exist, and where, as in the case of new industrial districts, a proper basis of wages and conditions is difficult to determine, the Board shall have the right to put into effect the rates which were awarded after due investigation and determination in other districts in which living conditions and cost of living are substantially the same. The Board shall keep itself fully informed as to the relation between living costs in the several districts and their comparison between progressive periods of time. *The decisions of the Board shall, under proper conditions, be retroactive, and it shall be the duty of the Board to make the decision effective.* At any time after six months have elapsed following such ratified agreement or any such final decision by the Adjustment Board on any question as to wages, hours or conditions in any plant or district, such questions may be reopened by the Adjustment Board for adjustment upon request of the majority of the craft or crafts at such plant affected by such agreement or decision, provided it can be shown that there has been a general and material increase in the cost of living. The decisions of the Board will, in so far as this memorandum may be capable of achieving such result, be final and binding on all parties; provided, however, that either the employers or employees in any district may have the right to appeal from the decisions rendered by the Adjustment Board to a Board of Review and Appeal to be made up as follows: Three members to be named jointly by the United States Shipping Board Emergency Fleet Corporation and the United States Navy Department, and three to be named by the President of the American Federation of Labor.

It is hereby stipulated and agreed that this memorandum shall supersede and stand in place of the "Memorandum for the Adjustment of Wages, Hours and Conditions of Labor in Ship-

building Plants," signed August 20, 1917, and that it shall become effective this 8th day of December, 1917.

(Signed):

FRANKLIN D. ROOSEVELT,
Acting Secretary of the Navy.
CHARLES PIEZ,
Vice President United States Shipping Board Emergency Fleet Corporation.
WILLIAM BLACKMAN,
Assistant to General Manager.
JAMES O'CONNELL,
President Metal Trades Department.
JOHN I. NOLAN,
International Moulders Union of North America.
J. A. FRANKLIN,
International President of Boilermakers, Iron Shipbuilders of America.
JOHN WILSON,
President Pattern Makers League of N. A.
MILTON SNELLINGS,
General President International Union of Steam and Operating Engineers.
G. A. VAN DORNES,
General Vice President I. B. of B. & H.
F. J. McNULTY,
by J. J. P., I. B. E. W.
JOHN J. HYNES,
President Amal. Sheet Metal Workers of A.
WILLIAM J. JOHNSTON,
I. A. of M., per P. Flaherty.

APPENDIX B.

*Decision as to Wages, Hours, and Other Conditions in Delaware River Shipyards.

First. During the month of October, 1917, when the Shipbuilding Labor Adjustment Board was absent on the Pacific coast, disputes arose in different yards in the Delaware River district. These were temporarily adjusted through the efforts of Mr. Raymond B. Stevens, vice chairman of the United States Shipping Board, *with the understanding that any wage scale subsequently determined by the Shipbuilding Labor Adjustment Board should be retroactive to the date when the men returned to work, November 2.* Although there may be some question as to whether this understanding was intended to apply to yards in which disputes had not yet arisen, *we have decided* to resolve this in favor of the employees and *to make the wage rates fixed retroactive as regards the shipbuilding crafts to which they apply to November 2* for all of the shipyards of the Delaware River district actually engaged in the building of ships for the Navy Department or the Emergency Fleet Corporation, to wit:

Chester Shipbuilding Co., Chester, Pa.
Harlan Plant, Bethlehem Shipbuilding Co., Wilmington, Del.
New Jersey Shipbuilding Company, Gloucester, N. J.
New York Shipbuilding Company, Camden, N. J.
Pennsylvania Shipbuilding Co., Gloucester, N. J.
Pusey & Jones Co., Wilmington, Del.
Sun Shipbuilding Co., Chester, Pa.
William Cramp & Sons Ship & Engine Building Co., Philadelphia, Pa.
Traylor Engineering & Manufacturing Co., Cornwells, Pa.

We do this because early in our investigation we became convinced by the unanimous testimony of both sides that a uniform minimum wage scale and uniform piece rates for all of the shipyards on the river from Bristol to the north, to Wilmington to the south, would be desirable, and because limiting the retroactive provision to employees who actually struck would amount to penalizing those who, notwithstanding their dissatisfaction with conditions, remained loyally at work, and thus be an incitement to future strikes.

For the yards in course of construction, to wit, the yards of the American International Shipbuilding Corporation, at Hog Island, Pa., and the Merchant Shipbuilding Corporation, at Bris-

*Extract from same document as Appendix A, p. 62, supra.

tol, Pa., we make the wage rates fixed for crafts engaged in construction work, which appeared before us with definite demands, to wit, carpenters, plumbers, pipe fitters, electrical workers, sheet-metal workers, painters, blacksmiths, moulders, and engineers, retroactive to the date when we held our hearing on conditions in those yards; that is, January 15, 1918.

* * * * * *

Fifth. The methods for determining the amount of back pay to which employees in the different yards shall be entitled shall be as follows:

(1) In the case of employees on the straight day-wage system the new hourly wage fixed by the Board is to be multiplied by the total number of hours which each employee worked from November 2 until the date when the new wage scale is put into effect. *From the quotient thus determined the total wage, including premiums and bonuses of every kind, which the employee received for his work, is to be deducted. The balance constitutes the back pay to which he is entitled.* In determining the total number of hours of employment, hours counted and paid for at time and one-half, or double time when the original payment was made, are to be counted as time and one-half or double time in calculating earnings at the new rate of wages, but all other hours are to be calculated as straight time.

(2) In the case of pieceworkers, a representative of the board is to determine, in co-operation with representatives of the pieceworkers of each craft and of each yard by a study of the actual cards of a dozen pieceworkers of each different craft in each yard, selected so as to cover the different kinds of piecework performed upon a vessel, the average increase in the earnings of such pieceworkers resulting from calculating their earnings at the new piece rates prescribed and comparing them with the earnings they actually received. *The average percentage of increase so determined for each piecework occupation, multiplied by the total earnings of each pieceworker of each respective occupation from November 2 until the date when the new rates become effective, shall determine the back pay which such pieceworker is entitled to receive.*

Sixth. *The back pay* due to both day workers and pieceworkers *shall be paid at the earliest date at which the elaborate calculations necessary to their determination can be completed, after the rates fixed by this decision are put into operation.*

Seventh. The minimum rates of wages to be paid to different classes of employees by all of the shipyards of the Delaware River

District shall be those set forth in the schedule appended hereto (Exhibit A), which is made a substantive part of this award.

* * * * * *

Thirteenth. No reduction in any of these piece rates is to be permitted on the part of any shipyard in the Delaware River district during the duration of the war.

Fourteenth. Believing that in this national emergency past differences between employers and employees must be forgotten in the common determination to produce the maximum possible number of ships, the board will not tolerate any discrimination either on the part of employers or employees between union and nonunion men.

Fifteenth. Rates of wages for occupations not covered by this decision shall be tentatively agreed upon between the individual shipyards and the employees concerned. Such tentative rates shall be reported to the examiner, who shall satisfy himself as to the fairness of the rates tentatively fixed and report a recommendation for their confirmation or modification by this Board. The Board shall, on the basis of such a report and recommendation, determine a uniform minimum rate for each such occupation and add it to the rates prescribed in this award.

Sixteenth. The rates and other conditions prescribed in this decision, except as otherwise provided, shall be put into effect on or before Monday, February 25, 1918.

Washington, D. C., February 14, 1918.

V. EVERIT MACY,
Chairman,
LOUIS A. COOLIDGE,
A. J. BERRES.

(12)

Office Supreme Court, U. S.
FILED
MAR 16 1926
WM. R. STANSBURY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

No. 237.

SUN SHIPBUILDING COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPELLANT'S MOTION TO REMAND.

FRANK E. SCOTT,
Attorney for Appellant.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

No. 237.

SUN SHIPBUILDING COMPANY, APPELLANT,

vs.

THE UNITED STATES, APPELLEE.

APPELLANT'S MOTION TO REMAND.

Upon the record and briefs filed herein the appellant respectfully moves the court to set aside the judgment of the Court of Claims and remand the cause to that court with directions to make certain additional findings of fact, as follows:

1. To find (*a*) the fair and reasonable value of the plaintiff's shipbuilding way No. 5 for the period of 112 days from June 18, 1917, to October 8, 1917, during which time the said way was held idle and available for the use of the Government, at the direction of the Navy Department; (*b*), the fair and reasonable value

of the said way for the period of 116 days, between October 8, 1917, and May 30, 1917, which were in excess of the 118 days reasonably required for the work under the contract of June 13, 1917, provided the necessary material has been duly delivered to the plaintiff; (*c*), what sum would constitute a reasonable allowance for depreciation of values of plaintiff's plant and property within the meaning of clause sixteen, sub-paragraph 1 (*f*) of the contract of June 13, 1917, and Section 302 of the revenue bill of September 8, 1916, mentioned in said contract (R. 14), and (*d*), whether the whole or any part of the items of $4,400.84, including 10 per cent of the base expenditure for salaries of superintendents and officers and $1,335.70, representing 10 per cent of retroactive wages for labor, were items of cost of labor and other direct charges, and/or 10 per cent thereof provided for by clause sixteen of the contract (R. 14).

2. To take further evidence, if need be, on which to base such additional findings.

3. To qualify or alter any of the existing findings, if necessary to bring them and the additional findings into accord.

4. To permit the amendment of the petition, if necessary in order that same may be made to conform to the proof.

5. In the event the question designated "(*d*)" in the above paragraph 1 of this direction is answered in the affirmative, to render judgment on all the findings when

completed, in favor of the plaintiff for the sum of the amounts so found as directed in paragraph 1 hereof, otherwise to render judgment in favor of plaintiff for the sum of the items under the directions designated "(a)," "(b)," and "(c)," in said paragraph, together with interest, as by law required, on such sums as shall be found due.

It is further moved that this motion be heard upon the argument of the appeal herein, and be deemed as submitted with the record and argument thereof.

Respectfully,

FRANK E. SCOTT,
Attorney for Appellant.

To the Honorable the Solicitor General:

PLEASE TAKE NOTICE that the above MOTION will be made upon the argument of the appeal herein.

Respectfully,

FRANK E. SCOTT,
Attorney for Appellant.

INDEX

	Page
Opinion below	1
Jurisdiction	1
The question	2
Statement	4
Summary of contentions	16
Argument:	
I. THE TRANSACTION INVOLVED WAS NOT A REQUISITION BUT A CONTRACT	17
II. THE ACTION OF THE COMPENSATION BOARD IN REJECTING THESE CLAIMS IS FINAL AND CONCLUSIVE	26
(A) THE CLAIM FOR THE USE OF THE WAYS	29
(B) THE CLAIM FOR $152,000 FOR AMORTIZATION OF WAR FACILITIES AND SPECIAL RENTAL	37
(C) REIMBURSEMENT FOR THE SUM OF $4,000.76 FOR THE ALLEGED PROPER PORTION OF APPELLANT'S COST AND EXPENSE FOR SUPERINTENDENTS' AND OFFICERS' SALARY, TOGETHER WITH A 10% PROFIT THEREON	41
(D) COMPENSATION IN THE SUM OF $1,335.70, REPRESENTING 10% OF THE ACTUAL COST IN THE PAYMENT BY APPELLANT OF RETROACTIVE WAGES, PURSUANT TO A DECISION OF THE SHIPBUILDING LABOR ADJUSTMENT BOARD	42
III. THE APPELLANT HAS FAILED TO PROVE THE ITEMS OF ITS CLAIM	44
Conclusion	45

AUTHORITIES CITED

Cases:	
American Smelting Co. v. *United States*, 259 U. S. 75	23
Converse v. *United States* (Ct. Clms. unreported, decided Feb. 15, 1926)	36
Duesenberg Motors Corp. v. *United States*, 56 Ct. Cls. 96 (affirmed 260 U. S. 115)	21
Kihlberg v. *United States*, 97 U. S. 398	33
Ripley v. *United States*, 233 U. S. 695	35
United States v. *Gleason*, 175 U. S. 588	33
United States v. *Mason & Hanger Co.*, 260 U. S. 323	33
Statutes:	
Act of Feb. 13, 1925, c. 229 (43 Stat. 936, 941)	2
Act of March 4, 1917, c. 180 (39 Stat. 1168, 1193)	22
Revenue Act of Sept. 8, 1916, Sec. 302 (39 Stat. 756, 781)	26
Judicial Code, Sec. 242	2

In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 237

SUN SHIPBUILDING COMPANY, APPELLANT

v.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The findings and opinion of the Court of Claims (R. 19) are reported in 59 Ct. Cls. 757.

JURISDICTION

A judgment in this case was entered on June 9, 1924. (R. 27.) Appellant filed a motion for a new trial on June 24, 1924 (R. 27), and on October 20, 1924, the findings of fact were amended. (R. 27.) A motion for leave to file an amended motion to amend the findings was filed on October 27, 1924 (R. 27), and was overruled by the Court of Claims

on November 3, 1924. (R. 27.) The appellant made application for an appeal on December 1, 1924 (R. 27), which was allowed on December 8, 1924. (R. 28.) The appeal was taken under Section 242 of the Judicial Code (later repealed by the Act of February 13, 1925, chap. 229, 43 Stat. 936, 941).

THE QUESTION

This action was based upon a claim of five items made by appellant growing out of the construction of three vessels for the Navy Department. The first item is for the value of the use of a certain ship way in appellant's shipyard which was used in the construction of said vessels. Such vessels were constructed under a contract between the appellant and the Government. The appellant now contends that the Government required this ship way to be held open for the construction of these vessels; that there was delay by the Government in the delivery of the materials, which in turn delayed the beginning of such construction, and that after the construction was begun, the Government was guilty of other delays which increased the time that the way was occupied in the construction of these vessels to a time greater than was necessary if the Government had furnished materials, etc., promptly. It is therefore claimed that the Government is liable for the reasonable value of the use of such ship way for the period of time that the same was occupied with the construction of these

vessels in excess of the time which would have been necessary for such construction had the Government acted promptly.

The appellant contends that the actions of the Government amounted to a requisition of this particular ship way for the time in excess of that which should have been required for the construction of the vessels, and as another theory of recovery, that compensation for the use of the way during the time above stated should have been allowed as damages for breach of the contract.

The Government, on the other hand, contends that there was no requisition of any of appellant's ship ways or other facilities; that there was no breach of the contract; that the vessels were built in accordance with the contract and have been paid for, and that such disputed questions as those now raised were by the contract referred to a board appointed by the Secretary of the Navy, and that such board rejected the contentions now made by appellant, and that the decision of that board is final and conclusive.

The Government also contends that the contract provided that the final arbitrator of all disputes should be the Secretary of the Navy, and that no appeal was made to him in this case, and in the absence thereof appellant can not be heard to complain.

The appellant also makes claim for three other items which it contends should have been allowed

as part of the costs of the construction of these vessels. These items were all submitted to and rejected by the Board of Compensation. The Government contends that their conclusions are final and that since there has been no submission to the Secretary of the Navy, who, by the contract, is the final arbitrator of all disputes, the appellant can not now be heard to complain.

The appellant also claims an item of $1,500 which was reserved by the Government from payments made to appellant because of the failure to execute a final receipt and release. The Court of Claims rendered judgment for this amount, which is concededly due the appellant, and of such judgment the Government does not now complain.

STATEMENT

The facts as found by the Court of Claims are as follows:

The appellant is a Pennsylvania corporation, and at the times in question owned and operated a shipbuilding yard at Chester, Pennsylvania, comprising five similar shipbuilding ways. (R. 19.) On June 13, 1917, appellant had contracts on hand for the construction of 18 vessels of 10,000 dead-weight tons capacity each. (R. 19.) About the date of the contract four of these ship ways were occupied, but way No. 5 was unoccupied and was being held for the construction of a vessel, materials for which were on hand and were then being fabricated. (R. 19.) About that date the

Secretary of the Navy was considering the construction of 24 mine sweepers. (R. 19.) The construction of part of these by appellant was the subject of conferences between appellant and representatives of the Government. Appellant did not desire to build any of the same because of its other contracts on hand, contending that these small vessels desired by the Government could be built in other yards less suited for the construction of larger ships. (R. 19.)

On June 12, 1917, the Navy Department sent a communication to appellant which stated in part as follows (R. 19–21):

> Referring to your telegram of June 11, 1917, in reference to the construction of seagoing mine sweepers, the President hereby places with you, as an order under the provisions of the Naval Appropriation Act of March 4, 1917, the requirement that you comply with the terms of a contract, to be signed hereafter, to construct seagoing mine sweepers Nos. 22, 23, and 24.
>
> You will be paid for these vessels on the basis of actual cost plus 10% profit.
>
> * * * * *
>
> You will be responsible for workmanship and for the most expeditious prosecution possible of the work after receipt of necessary materials, and for the time of delivery, except as affected by delivery of material, and subject to the usual contract clause permitting extension of time in case of delays due to strikes or causes beyond your control.

> The responsibility for suitability of and delivery of materials, and for performance of the vessels, in so far as affect by design and materials, will rest with the Government.
>
> * * * * *
>
> The construction of these vessels in the quickest possible time is considered by the military authorities to be of the highest importance, and work on them, and the materials for them, has been assigned a place in order of relative importance with other war work equal to and parallel with torpedo boat destroyers, which gives them precedence over all other classes of naval construction, with the exception of repairs and conversion work on completed ships and work on submarine chasers. The Department trusts that you will do all in your power to expedite the completion of these vessels at the earliest possible date.

At some time during the negotiations between May 16, 1917, and June 12, 1917, with reference to the construction of these vessels, representatives of the Secretary of the Navy directed the appellant to hold its way No. 5 open for the construction of these mine sweepers. Appellant represented that if it might be permitted to go ahead with its plan for the use of way No. 5, it could make another way free in time for the mine sweepers; but the representatives of the Navy were unwilling to take any chance in this respect, and insisted on No. 5 being held for the Government's vessels. (R. 21.)

Subsequently the Secretary of the Navy forwarded to appellant for execution a contract bearing date June 13, 1917. The contract was later executed but the exact time of the execution does not appear. (R. 21.)

On June 19, 1917, appellant represented that another shipbuilding company wanted to build 4 mine sweepers, and asked authority to assign this contract, but the Navy Department refused. (R. 21.) On June 29, 1917, appellant acknowledged receipt of the Secretary's letter refusing to consent to the assignment, and stated that it was accordingly entering order for these vessels. (R. 21.) As to the contract, it said in this letter that (R. 21)—

> We have gone over your form of contract for the sweepers and believe it to be fair and reasonable in every particular, save that pertaining to the demurrage on other ships, for which we have contracts. We shall, of course, expect your department to protect us against our paying any and all demurrage accruing on these contracts due to the building of these mine sweepers.
>
> We await a formal contract from you for our execution.

The contract which was executed states in the heading that it is a contract of two parts made and concluded June 13, 1917, by and between the appellant and the United States. (R. 7.) It then provides that (R. 7, 8)—

> Whereas the Act of Congress making appropriations for the Naval Service for the

> fiscal year ending June 30, 1918, approved March 4, 1917, under the title Naval Emergency Fund, authorizes the President to construct or purchase such naval small craft as he may direct in addition to the vessels authorized in said act;

and after referring to the approved plans and specifications for mine sweepers, further provided that (R. 8)—

> Whereas the Congress having declared by joint resolution, approved April 6, 1917, that war exists between the United States and Germany, the President hereby places with the Sun Shipbuilding Company, as an order under the provisions of said act of March 4, 1917, the requirement that it comply with the contract, hereinafter set forth, to construct 3 of said vessels, complete in all respects * * *.

The contract then proceeds to state:

> Now, Therefore, This Contract Witnesseth, That, in consideration of the premises, and for and in consideration of the payments to be made as hereinafter provided, the contractor hereby covenants and agrees to and with the department as follows, that is to say: * * *.

Then follows the provisions for the building of the vessels, it being in substance arranged that the appellant should make the necessary outlays to construct and complete these vessels (R. 8), the construction of the same to conform in all respects to the drawings, plans, and specifications including

authorized changes therein. (R. 9.) The materials for such vessels were to be ordered by the Harlan & Hollingsworth Corporation, subject to the approval of the Government, for delivery direct to appellant, who should receive and pay for the same. (R. 9.) It was provided that the workmanship should be first class (R. 10), and that the vessels and materials, etc., should be kept duly insured. (R. 10.)

And then concerning the prosecution of the work, Article Seventh of the contract provided (R. 10):

> Unless prevented by strikes, the work under this contract shall be prosecuted at all times with the utmost vigor and dispatch, without interruption for any cause within the control of the contractor, and the number and class of men engaged on the contract, and the hours of work, subject to the limitations in the thirteenth clause, shall be subject to the approval and direction of the department. It is understood that the contractor proposes to extend its present plant and to add to its present facilities especially for the purpose of carrying out this contract as may be necessary, and that it is to be especially compensated therefor hereinafter provided for, but the contractor will not be required to build a dry dock capable of accommodating this vessel.

It was then provided that trials and tests should be made by appellant, and if such were satisfactory the Government should accept the vessels, condi-

tioned upon further tests, a reserve being made by the Government from the moneys due until the final tests and acceptance. (R. 10 and 11.)

Article Tenth of the contract provided that (R. 11, 12)—

> In case of the failure or omission of the contractor at any stage of the work prior to its completion, not due to strikes or any other cause or causes beyond its control, to go forward with the work and make satisfactory progress towards its completion, the department may declare this contract forfeited. In case such forfeiture shall be declared, the title to said vessel, or so much thereof as shall have been completed, and to all materials on hand applicable thereto, shall forthwith vest in the department; and the department may immediately enter the works and premises of the contractor and take possession of said vessel and materials.

It was then provided that should the Government take over the work as provided in Article Tenth, that it might proceed with the work, if it desired, at the works of the contractor or elsewhere. And further provided (R. 12):

> * * * and the contractor, on receiving notice of the intention of the department to proceed with the completion of the work, will surrender said vessel and all materials on hand, together with the use, if required, of the yard or plant, and all machinery, tools, and appliances appertaining thereto

and theretofore used, or necessarily to be used, in and about the finishing of the work.

It was further agreed in such contract that the Government should pay for the construction of the vessels, including authorized changes, actual cost plus 10% for profit. (R. 14). Cost was defined in a general way in such contract (R. 14) as including (a) the cost of labor, materials, etc.; (b), (c), and (d) proper proportions of certain overhead and general expenses; (e) proper proportions of losses from fires, flood, etc., and losses and damages resulting from displacement of or delay in work contracted for prior to the date of this contract (R. 14); and (f) (R. 14)—

> A reasonable allowance, according to the conditions, for depreciation of values of plant and property. Exceptional depreciation of extensions, increases and additions to plant and property specially acquired for or devoted to the manufacture or erection of the work or the construction of the vessel under this contract will be accounted for in payments under the item special rentals provided for in paragraphs 2 and 3 of the seventeenth clause of this contract.

For the determination of the cost as defined in the contract, Article Seventeenth of such contract provided for the creation of a "Compensation Board" to be appointed by the Secretary of the Navy. It was provided that (R. 16)—

> This board shall ascertain, estimate, and determine the actual cost in accordance with

the sixteenth clause hereof, and shall determine the proper proportions and reasonable allowances referred to therein, and the decision of said board or a majority thereof shall be binding on both parties to the contract, subject to the approval of the department.

Article Seventeenth further provided that the board (R. 16)—

> * * * will determine a fair special rental to be allowed the contractor for the use of such additional plant and equipment as must be provided for and used in the carrying out of this contract, such rental to be determined monthly, so nearly as may be to recompense the contractor nor to exceed fifty per cent of the actual cost of such additional plant and equipment, when and as the expenditures therefore are made; provided, that at the close of the contract the compensation board will then estimate, ascertain, and determine the value to the contractors of such additional plant and equipment at that time, taking account of all the circumstances, such as additional use made of said additional plant and equipment during the period of the contract, the condition of the shipbuilding business, the desirability of such equipment at that time in carrying on the business, its first cost as compared with the first cost in a normal material and labor market, its replacement value at the time when said determination is being made.

> In case the special rental that has been allowed from time to time during the period of the contract does not equal the difference between the first cost of said additional plant and equipment and the value as ascertained at the close of the contract for said additional plant and equipment, the department will pay to the contractor a sum equal to said difference. In case the special rental that has been allowed from time to time during the period of the contract is in excess of the difference between the first cost of said additional plant and equipment and the value as ascertained at the close of the contract, the department will deduct from the final payments and special reserve due the contractor a sum equal to said difference: provided, that no special rental shall be paid for any such additional plant and equipment whose installation shall not have been passed upon and approved by the compensation board.

The contract also provided that upon final completion of the contract the reserves provided for should be paid upon the execution of a final release by appellant to the Government. Article Nineteenth of the contract provided as follows (R. 17):

> If any doubts or disputes arise as to the meaning of anything in the contract, drawings, plans, or specifications, or if any discrepancy appear between said drawings, plans, or specifications and this contract, the matter shall be referred *to* at once to the Secretary of the Navy for determination; and his decision in the premises shall be

conclusive and binding upon the parties hereto: *Provided*, That both parties hereto shall have the right of appeal to the President of the United States.

Appellant gave a bond for the faithful performance of the contract. (R. 17, 18.)

Following the orders and directions of the Secretary of the Navy, appellant's way No. 5 was kept open and available for the construction of the 3 mine sweepers. The Government did not supply the material sufficient to permit the laying of the keels until October 8, 1917, and way No. 5 remained idle between June 18, 1917, and October 8, 1917, a total of 112 days. This delay was repeatedly called to the attention of the Navy Department by appellant. (R. 22.)

There were subsequent delays in the delivery of the necessary material for completion of the vessels, and way No. 5 was occupied in said work until May 30, 1918. (R. 22.) A reasonable time for the occupation of way No. 5 in the construction of the 3 mine sweepers, had the materials been promptly furnished, would have been approximately 118 days. This finding is approximate only as there was no basis for accurate determination of such time. (R. 22.) Appellant performed all of the terms of the contract to the satisfaction of the Navy Department (R. 22), and was paid $1,664,390.09, which sum did not include any compensation for certain items of a claim made to the Navy Department, which were:

1. Compensation for the use of way No. 5 for 228 days, being the alleged excess occupation because of delays of the Government.

2. Compensation in the sum of $152,000 for amortization of war facilities or special rental claimed under paragraphs 16 and 17 of the contract.

3. Reimbursement of $4,000.76 for alleged proper proportion of appellant's cost and expense for superintendents' and officers' salaries, and the additional compensation of 10% thereof aggregating $4,400.84 alleged to be provided for in paragraph 16 of the contract.

4. Compensation in the sum of $1,335.70, representing 10% of the actual payment by appellant of retroactive wages pursuant to a decision of the shipbuilding labor adjustment board; and

5. Balance of $1,500 considered to be due appellant, but withheld awaiting execution of a final release. (R. 22, 23.)

All of the above items except the $1,500 reserve were incorporated in claims by appellant presented to and considered by the Compensation Board created as provided in the contract, and were by said board rejected. (R. 23.) While the claim was pending before such Compensation Board, appellant waived all of the claims arising from delay after the material was received and construction started, and made claim only for the 112 days during which the ways were held idle before any material was delivered.

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There is no averment or evidence that the Compensation Board in considering or acting upon appellant's claim acted in bad faith or otherwise than in the exercise of an honest judgment. (R. 23.)

SUMMARY OF CONTENTIONS

The appellant contends:

1. That there was a requisition of way No. 5 of appellant's plant for a period of 112 days, prior to the laying of the first keel on October 8, 1917; and that there was a requisition of such way for an additional period of 116 days during the time which said way was occupied after the first keel was laid, which occupancy for said 116 days was due to delay by the Government in the furnishing of materials to complete the vessels. It is contended by appellant that this additional period of 116 days is an extension or a prolongation of the requisition for the 112 days.

2. Appellant further contends that even if there was no requisition of the ways, the reasonable value of the use thereof for these periods should be allowed to appellant as damages because of the alleged breach of the contract by the Government in delaying the furnishing of materials.

3. The appellant also claims that though all of the items in this suit for which it makes claim, except the one for which the Court of Claims rendered judgment and which is not disputed by the Government, were rejected by the Compensation Board, which the contract made the arbitrators of questions of cost, the action of the arbitrators was

in direct conflict with the provisions of the contract and was such a gross mistake as to imply bad faith, or at least amounts to constructive fraud, and that therefore such action is not binding.

The Government contends:

1. That there was no requisition but that the transaction here involved is a contract.

2. That the action of the Compenastion Board in rejecting these claims is final and conclusive and binding upon the parties.

3. That the contract provided that the Secretary of the Navy should be the final arbitrator of all disputes including questions of law and fact with the right to appeal to the President; that it does not appear that such remedies were pursued; and that without first resorting to these remedies, appellant has no standing in this Court and can not now be heard to complain.

4. That so far as the record now stands, the claims, even if allowable, were not proved.

ARGUMENT

I

THE TRANSACTION INVOLVED WAS NOT A REQUISITION, BUT A CONTRACT

The Navy Department determined upon the construction of these mine sweepers. On May 16, 1917, the Navy Department inquired as to the suitability of appellant's plant for the construction of these vessels. The appellant, having plenty of work on hand, did not desire to build such ves-

sels. But on June 12, 1917, the Navy Department communicated with appellant stating that the President hereby places with you (R. 20)—

> as an order under the provisions of the Naval Appropriation Act of March 4, 1917, the requirement that you comply with the terms of a contract, to be signed hereafter, to construct seagoing mine sweepers Nos. 22, 23, and 24.

The communication contained further provisions concerning the nature of the work to be done and the price to be paid therefor.

Between May 16, 1917, and June 12, 1917, way No. 5 at appellant's shipyard became vacant, and appellant was about to cause the same to be occupied with some of its commercial contract construction. The representatives of the Government, however, directed appellant to hold it way No. 5 open for the construction of the mine sweepers. Appellant represented that it would have other ways vacant in time for the construction of such mine sweepers, but the representatives of the Navy were unwilling to take any chances in this respect and insisted upon way No. 5 being held open. (R. 21.)

Subsequently the Navy Department forwarded to appellant a contract bearing date June 13, 1917. It was executed subsequent to that date, but the exact date of execution does not appear. By letter of June 29, 1917, appellant advised (R. 21):

> We have gone over your form of contract for the sweepers and believe it to be fair and reasonable in every particular, save that pertaining to the demurrage on other ships, for which we have contracts. We shall, of course, expect your department to protect us against our paying any and all demurrage accruing on these contracts due to the building of these mine sweepers.

The contract which was finally signed by appellant contained a provision which expressly provided that payments to the appellant should include (par. 16 (e), R. 14)—

> a proper proportion of a reasonable allowance for losses and damages resulting from displacement of or delay in work contracted for prior to the date of this contract caused by or contributed to or by work under emergency conditions performed by the contractor for the department.

The contract as actually executed recites the existence of the war, and states that (R. 8)—

> the President hereby places with the Sun Shipbuilding Company, as an order under the provisions of said act of March 4, 1917, the requirement that it comply with the contract, hereinafter set forth, to construct 3 of said vessels * * *.

It also provides that (R. 8)—

> Now, Therefore, This Contract Witnesseth, That, in consideration of the premises, and for and in consideration of the pay-

> ments to be made as hereinafter provided, the contractor hereby covenants and agrees to and with the department * * *.

Then follows the provisions with reference to the construction of these vessels, it being in substance agreed that the appellant would build the vessels subject to certain plans and specifications to be furnished by the Government or its agents, and the Government would pay the cost thereof plus a certain profit. The general method of ascertaining the cost was provided for in paragraph sixteenth of the contract, and as above shown it was further provided that a board should be the final arbitrator of disputes over such items of cost. Appellant gave a bond for the faithful performance of such agreement. (R. 17, 18.)

Out of the above circumstances the appellant contends that there was a requisition or a commandeering, under the Act of March 4, 1917, of appellant's way No. 5 for the period of time between June 18, 1917, and the date of the laying of the keel for the first vessel. (R. 22, 23.) Its theory is difficult to understand. The Government submits that the transaction is not a requisition or commandeering of any of appellant's property, but that it is a contract which includes the time that appellant's ways were idle before the laying of the first keel in October, 1917. Neither the communication of June 12, 1917, nor the contract dated June 13, 1917, contained the words or the intention of a requisition or a commandeering. The

Government did not seek to take anything by those documents. It merely placed an order with appellant for the construction of three vessels, just as many private concerns often place orders for the manufacture of articles or the delivery of merchandise. It is true that both the communication of June 12, 1917, and the contract itself stated that the order was placed

> as an order under the provisions of said act of March 4, 1917, the requirement that it comply with the contract hereinafter set forth * * *.

The Court of Claims considered such a clause as this, and concerning it made the following statement in the case of *Duesenberg Motors Corporation* v. *United States*, 56 Ct. Cls. 96, 101, 102 (affirmed 260 U. S. 115):

> The recital in the contract that "the President hereby places the following order with the contractor with the requirement that it comply with the contract hereinafter set forth," does not alter the fact that the contract was a voluntary one. The contractor knew, or ought to have known, that it was not in the power of the United States to compel it to enter into a contract, and that the provisions of the act cited in the contract did not confer any such power. Therefore the court in passing upon the issues presented in this case will consider the rights of the parties as being those of contractors.

An examination of the statute applicable to this question (Act of March 4, 1917, Chap. 180, 39 Stat. 1168, 1193) will show exactly what the Government did and what it intended to do. The statute provided that the Government might—

> place an order with any person for such ships or war material as the necessities of the Government, to be determined by the President, may require and which are of the nature, kind, and quantity usually produced or capable of being produced by such person. Compliance with all such orders shall be obligatory on any person to whom such order is given, and such order shall take precedence over all other orders and contracts theretofore placed with such person. If any person owning, leasing, or operating any factory equipped for the building or production of ships or war material for the Navy shall refuse or fail to give to the United States such preference in the execution of such an order, or shall refuse to build, supply, furnish, or manufacture the kind, quantity, or quality of ships or war material so ordered at such reasonable price as shall be determined by the President, the President may take immediate possession of any factory of such person, or of any part thereof * * *.

In other words, the statute authorized the President to place an order with manufacturers and if that order was not accepted, to take over their plant and factory, or so much thereof as might be

needed for war purposes. If the President took over the plant or factory, clearly there would be a commandeering of property, but when the President placed an order with the statement that that order was placed under the provisions of that Act, and the manufacturer accepted the order, there was no occasion for the exercise of the power of eminent domain by the officers of the Government. The placing of this order in this case was merely a preliminary step to a commandeering of property which might have followed had the order been rejected. But the order was not rejected; on the contrary it was accepted and a formal contract thereon signed. A contract was thereby created. It is true that appellant preferred to do other work or perform other contracts. If it preferred to stand upon its legal rights, by refusing to accept and sign the contract, it should have done so. Its mere preferences in these respects will not convert the contract in a requisition. This Court decided that question in the case of *American Smelting Co.* v. *United States,* 259 U. S. 75, 78.

However, the facts in this case are even stronger than the situation just discussed. The appellant here executed a written contract expressly stating that in consideration for the agreements made by the United States, the appellant agreed to perform the work which is the subject of this controversy. Further than that, the letters or communications by appellant to the United States show that in its opinion the terms and conditions offered by the

Government were "fair and reasonable in every particular," except one not material here, but which in fact was cared for in the contract which was executed, and after that the formal contract was signed. In other words, there was a meeting of the minds of the parties. There was no forcible taking of appellant's property against its will. If there had been a requisition or a commandeering, no consent by appellant would have been necessary or even proper. An examination of the terms of the contract shows that, except for the provisions referring to the statute under which it was made and which has been heretofore discussed and explained, it was in no sense different from the ordinary contract where the parties come together and after long negotiations place their agreement in writing.

A detailed examination of the terms of the contract shows that every detail is a matter of agreement. The parties did not intend or consider the transaction as an appropriation of appellant's plant or any part thereof. This is conclusively shown by paragraph eleventh (R. 12) of the contract which gives the Government the right to take the use of appellant's shipyard, or any part thereof, to complete the vessels in the event that the appellant defaulted in the performance of the contract. An intention to appropriate the property is necessary. If the Government had intended to and had already appropriated this plant or any part thereof, there was no necessity for the provision in the contract which has just been stated.

The appellant also gave a bond (R. 17, 18) for the faithful performance of this contract. There is no power in the Government to compel appellant to execute a written contract. There is no power to compel it to do work for a 10% profit upon the cost, and there certainly is no power to compel appellant to execute a bond. All these things show that the whole transaction here involved was a contract and an agreement, and not a requisition.

The findings in this case show that some time during the negotiations preceding the execution of the written contract between May 16, 1917, and June 12, 1917, representatives of the Secretary of the Navy directed appellant to hold way No. 5 open. (R. 21.) The written contract was signed later. (R. 21.) The statute authorized the President to commandeer property. Can it be said that this request by undesignated and unidentified agents of the Navy Department at a time not definitely fixed amounts to an exercise of the power of eminent domain under this statute? The claim here is confined to time after June 18, 1917. (R. 22, 23.) The contract speaks as of its date of June 13, 1917. It was executed after all of these preliminary negotiations. All of such negotiations were merged into the contract.

II

THE ACTION OF THE COMPENSATION BOARD IN REJECTING THESE CLAIMS IS FINAL AND CONCLUSIVE

This contract provided that the Government should pay "actual cost, plus 10% for profit." (R. 14.) It further provided that so far as applicable costs as defined in Section 302 of the Revenue Act of September 8, 1916, (Chap. 463, 39 Stat. 756, 781) should control. That Act provided:

> SEC. 302. That in computing net profits under the provisions of this title, for the purpose of the tax there shall be allowed as deductions from the gross amount received or accrued for the taxable year from the sale or disposition of such articles manufactured within the United States, the following items:
>
> (a) The cost of raw materials entering into the manufacture;
>
> (b) Running expenses, including rentals, cost of repairs and maintenance, heat, power, insurance, management, salaries, and wages;
>
> (c) Interest paid within the taxable year on debts or loans contracted to meet the needs of the business, and the proceeds of which have been actually used to meet such needs;
>
> (d) Taxes of all kinds paid during the taxable year with respect to the business or property relating to the manufacture;
>
> (e) Losses actually sustained within the taxable year in connection with the

business of manufacturing such articles, including losses from fire, flood, storm, or other casualty, and not compensated for by insurance or otherwise; and

(f) A reasonable allowance according to the conditions peculiar to each concern, for amortization of the values of buildings and machinery, account being taken of the exceptional depreciation of special plants.

Article Sixteenth (R. 13, 14) of the contract provided that actual cost should include—

(a) The cost of labor and materials;

(b) A proper proportion of interest on bonds, debts, and loans;

(c) A proper proportion of running expenses including rentals, repairs, maintenance, " management, salaries, and other indirect charges ";

(d) A proper proportion of taxes;

(e) A proper proportion of losses from fire, flood, etc., and " damages resulting from displacement of or delay in work contracted for prior to the date of this contract caused by or contributed to or by work under emergency conditions performed by the contractor for the department."

(f) "A reasonable allowance, according to the conditions, for depreciation of values of plant and property. Exceptional depreciation of extensions, increases and additions to plant and property specially acquired for or devoted to the manufacture or erection of the work or the construction of the vessel under this contract will be accounted

for in payments under the item special rentals provided for in paragraphs 2 and 3 of the Seventeenth clause of this contract." (R. 14.)

Article Seventeenth of the contract provided for the creation of a Compensation Board to consist of from three to six persons, which board (R. 16)—

> shall ascertain, estimate, and determine the actual cost in accordance with the sixteenth clause hereof, and shall determine the proper proportions and reasonable allowances referred to therein, and the decision of said board or a majority thereof shall be binding on both parties to the contract, subject to the approval of the department.

Article Seventeenth also provided that the board (R. 16)—

> will determine a fair special rental to be allowed the contractor for the use of *such additional plant* and equipment as must be provided for and used in the carrying out of this contract * * *. (Italics ours.)

This article further provided that at the end of the contract the Compensation Board should determine the cost of such facilities, together with the then value of such facilities to the appellant, and if the special rental allowances made were not equal to the difference between such cost and the then value, that a further allowance of such difference should be made to the appellant; that, however, if the difference was less than the amount of such allowances for special rental, the appellant should

repay to the United States the amount which it had so been overpaid. This article also provided (R. 16)—

> that no special rental shall be paid for any such additional plant and equipment whose installation shall not have been passed upon and approved by the compensation board.

Article nineteenth provided that (R. 17)—

> If any doubts or disputes arise as to the meaning of anything in the contract * * * the matter shall be referred *to* at once to the Secretary of the Navy for determination; and his decision in the premises shall be conclusive and binding upon the parties hereto: Provided, that both parties hereto shall have the right of appeal to the President of the United States.

(a) The claim for the use of the ways

The appellant contends, first, that this item should be allowed as having been a requisition of appellant's way No. 5 for the period of time stated. We have heretofore discussed this theory and submit that it is not well founded. But the appellant further contends that even if this claim should be regarded as being covered by the contract, the Government's delay in furnishing materials with which to enable appellant to begin construction of the vessels, as well as its delay in furnishing materials after the construction began was a breach of the contract which brought about such alleged loss to appellant, and therefore because of such breach of the

contract, appellant can recover the value of the use of this way during such time.

The Government contends there was no breach of this contract. The letter from the Navy Department to the appellant which preceded the execution of the formal contract (R. 19, 20) provided that the materials would be supplied through Harlan & Hollingsworth Corporation, and the appellant would pay for the same and include such payments in the cost of the vessel to be charged to the United States. (R. 20.) It was further stated in such letter that the appellant would be responsible (R. 20)—

> for the most expeditious prosecution possible of the work *after receipt of necessary materials*, and for the time of delivery, *except as affected by delivery of material*, and subject to the usual contract clause permitting extension of time in case of delays due to strikes or causes beyond your control. The responsibility for suitability of and delivery of materials, and for performance of the vessels, in so far as affect by design and materials, will rest with the Government. (Italics ours.)

It was also stated that the materials for these vessels had been assigned a place in order of relative importance with other war work equal to and parallel with torpedo boat destroyers which gives them precedence over all other classes of naval construction, except repairs and conversion work on

completed ships, and work on submarine chasers. (R. 20, 21.) The contract itself in Article Fourth provided that (R. 9.)—

> The materials to be used in the construction of these vessels will be ordered by the Harlan & Hollingsworth Corporation, subject to the approval of the department, as aforesaid, for delivery direct to the contractor, who will receive the same and make payment direct to the individual, firm, or corporation with whom the order has been placed, * * *.

And further provided in Article Seventh that (R. 10.)—

> Unless prevented by strikes, the work under this contract shall be prosecuted at all times with the utmost vigor and dispatch, without interruption for any cause within the control of the contractor, * * *.

These are the only provisions in the letter preceding the contract or in the contract itself which have a bearing upon the time of delivery of these materials. There is nothing in any of such provisions fixing a definite time for the delivery thereof. The United States was not obligated to cause such delivery at any stated time. So far as the contract or the letter provides, the materials might be delivered at any time that the Government saw fit. Under these circumstances there was no breach by the Government concerning the delivery of materials, and in the absence of a breach appellant can not recover for such breach.

But even if we assume (which we do not concede) that the contract should be read as requiring the Government to deliver the materials either within a reasonable time or as soon as the Government might be able to make such delivery, still there can be no recovery. There is nothing in this record to show that the delivery when made by the Government was not within a reasonable time, but, on the contrary, in view of the existence of the war and the conditions generally prevailing in industries at that time, we think it is shown that the delay by the Government was not unreasonable. The correspondence proceeding the contract as well as the contract itself show that both parties anticipated that delays in delivery of materials were probable. There is also nothing in this record to show that the Government failed to deliver these materials just as soon as it was able to make such delivery. In the absence of these facts, no breach has been shown and there can be no recovery because of the breach.

The Government further contends that by paragraph seventeenth of the contract such matters as this were referred for decision by the compensation board appointed by the Secretary of the Navy, and its decision was made final and conclusive upon the parties. Such paragraph is in part as follows (R. 16)—

> For the determination of the actual cost as defined above a "compensation board" composed of not more than six nor less than

> three officers of the Navy shall be appointed by the Secretary of the Navy. This board shall ascertain, estimate, and determine the actual cost in accordance with the sixteenth clause hereof, and shall determine the proper proportions and reasonable allowances referred to therein, and the decision of said board or a majority thereof shall be binding on both parties to the contract, subject to the approval of the department.

The court below found as a fact that this item for use of the way during the period of alleged delay was presented to such board and there rejected. (R. 22, 23.) The record does not show that a proper allowance for such claim was not otherwise included in monthly allowances or even in other items in final settlement approved by the Compensation Board and paid by the Government.

It is submitted that where matters are referred to a person or group of persons designated in the contract, and their decision is by such contract made binding and final, that in the absence of fraud or bad faith, or a mistake so gross as necessarily to imply bad faith, such decision will not be subjected to the revisory powers of the court. *Kihlberg* v. *United States*, 97 U. S. 398, 402; *United States* v. *Gleason*, 175 U. S. 588, 602; *United States* v. *Mason & Hanger Company*, 260 U. S. 323, 326. The appellant, however, contends that the decision and action by the board is so directly contrary to the contract itself, that the court must say that there has been a constructive fraud and thereby disre-

gard the action by the board. The Court of Claims found that (R. 23)—

> There is no averment or evidence that the compensation board in considering and acting on plaintiff's claim acted in bad faith or otherwise than in the exercise of an honest judgment.

The Government finds no express provision of the contract which provides for the payment by the United States for the use of the ways through such period of delay, and it may be again recalled that the contract did not contemplate any certain or definite time within which the Government should deliver these materials. The materials were delivered within a reasonable time. Also reasonable allowances for this item may have been included in other allowances made by the Compensation Board. The record in this case does not show that they were not so covered. In these circumstances there is no such gross mistake as would necessarily imply bad faith. And therefore the action by the Compensation Board must be considered as final and conclusive.

Further than this, Article Nineteenth of the contract provided that (R. 17)—

> If any doubts or disputes arise as to the meaning of anything in the contract, drawings, plans, or specifications * * * the matter shall be referred *to* at once to the Secretary of the Navy for determination; and his decision in the premises shall be

> conclusive and binding upon the parties hereto: Provided, that both parties hereto shall have the right of appeal to the President of the United States.

Here is a provision by which the parties agree that the Secretary of the Navy, subject to an appeal to the President, should be the final arbitrator of questions both of law and of fact, and of all questions or disputes arising as to the meaning of anything in the contract. Such provision certainly includes the claim here made. There can be no question of the right of the parties to provide for such a final and conclusive arbitration of all questions and disputes. The record in this case fails to show that appellant ever availed itself of this method of a decision of such question, and it is submitted that in the absence thereof appellant can not now be heard to complain. This Court, so far as we are able to ascertain, has never spoken upon such question except that an excerpt from the decision in the case of *Ripley* v. *United States*, 223 U. S. 695 at 702, may be said to recognize the correctness of the Government's contention. The Court there said:

> The defendant claims that the plaintiff lost his right to recover because he failed to appeal to the Engineer in Charge, at Galveston, or to the Chief of Engineers, in Washington. But there was no requirement or provision for appeal in the contract. The clause relied on by the Government relates to the duty of inspection and acceptance,

> making the decision of the Engineer in Charge conclusive as to the quality and quantity of work and material. That part of the agreement had no reference to the settlement of the core. Whether it had sufficiently consolidated involved the determination of a matter of fact, varying from day to day. The contractor had to act or refrain from acting when the decision was made. That matter was expressly left to " the judgment of the United States agent in charge." The contractor in submitting to his decision did not lose his right to recover damages occasioned by the refusal to permit the crest blocks to be laid, when, as found by the court, this refusal was gross error and an act of bad faith.

The Court of Claims has squarely decided this question in the recent case of *Converse et al* v. *United States,* C. Cls. C–1202, decided February 15, 1926, and not yet reported in bound volumes. In that case there was a provision in the contract to the effect that the Government by its officer in charge should at all times exercise full supervision and direction of the work, and that—

> all questions, disputes, or differences as to any part or detail thereof shall be decided by such officer in charge. * * *

The Court of Claims there said:

> The claims of the plaintiffs arose largely from the differences between them and the United States as to the space, spur track, and labor situation. The plaintiffs had the

> right to invoke this clause of the contract. They did not do so, and having failed to avail themselves of the remedy accorded to them by the provisions of the contract it is too late now to appeal to the court for redress. Parties must abide by their contracts. The court will enforce the provisions of contracts and can not take into consideration questions of hardships entailed upon parties who by their own acts have precluded themselves from relief in the courts.

It is submitted that the holding of the Court of Claims is sound and should be applied in this case.

For the reasons above set forth, it is submitted that appellant should not recover upon its claim for the value of the use of the ways which it claims was caused by the delay of the Government in furnishing materials.

(b) The claim for $152,000 for amortization of war facilities and special rental

In its petition appellant alleges this claim as "an item for amortization or depreciation of values of plant and property described in said order or contract, amounting to $95,773.75." (R. 6.) However, the Court of Claims in its findings states the claim as (R. 23)—

> Compensation in the sum of $152,000 for amortization of war facilities or special rental which it is alleged is provided for in paragraph 1 (f) of the sixteenth clause and paragraphs 2 and 3 of the seventeenth clause of the contract of June 13, 1917.

In its brief in this case appellant states that its claim is for depreciation and amortization of its facilities under paragraph sixteenth, and that it is not a claim for special facilities under paragraph seventeenth. It is submitted that the statement by the Court of Claims in its findings of fact after the hearing of evidence must govern and control as to what is the nature of appellant's claim. The Court of Claims, as above shown, has in its findings of fact expressly stated that it is for special and war facilities. Article Sixteenth of the contract provided for the payment of cost plus a profit and stated that cost should include (f) a reasonable allowance, according to the conditions for depreciation of values of plant and property. (R. 14.) It also provided that exceptional depreciation for plant specially acquired for the purposes of the contract should be cared for as provided for in Article Seventeenth of the contract. (R. 14.)

Article Seventeenth of the contract provided for the appointment of the Compensation Board, as has been heretofore set out, and stated that the board (R. 16)—

> will determine a fair special rental to be allowed the contractor for the use of *such additional plant and equipment* as must be provided for and used in the carrying out of this contract * * *. (Italics ours.)

It further provided that at the end of the contract the board should determine the then value of these additional facilities, considering many things,

such as the appellant's business, the condition of the industry, etc.; and that from the difference between the original cost and the then value they should deduct the allowances which had theretofore been paid for special rental for such special facilities, and if there was any difference that the Government should pay to the appellant such difference, or if the appellant had been overpaid by way of such special rental, the appellant should in turn reimburse the Government. This article closed with the following (R. 16):

> Provided, that no special rental shall be paid for any such additional plant and equipment whose installation shall not have been passed upon and approved by the compensation board.

As has been heretofore shown, the Compensation Board was to pass upon and decide these items of cost; and their decision by the contract was made final and binding. (R. 16.) The court below found as a fact that this item was submitted to the Compensation Board and by it rejected. (R. 23.) We have heretofore shown in connection with the discussion of item (a) that the decision of this board in the absence of bad faith, or such gross mistake as to imply bad faith, is binding and conclusive. That board may have rejected the claim for any one of the following reasons:

(1) That there were no special facilities furnished;

(2) If any such were furnished, the cost at the time of construction, which was about June, 1917, the date of the contract, was less than the value in May, 1918, the date of the launching of the last vessel;

(3) If it was a claim for depreciation of ordinary facilities, the board may have held that there was in fact no such depreciation; or

(4) If there was any such depreciation, due allowance had been made in other items;

(5) If it is a claim for special facilities, there is no showing in this record that the same were ever approved by the Compensation Board before they were installed, and the contract expressly makes that a condition precedent to any payment by the Government for such facilities.

The record shows nothing concerning these questions. The record does not show that, in fact, any loss was actually suffered by appellant either because of depreciation in ordinary facilities or because of alleged loss on special facilities. On such a record this Court will not say that the action of the Compensation Board was either in bad faith or so grossly erroneous as to imply bad faith. Their finding is final and conclusive and should stand. The parties have agreed to this.

The record does not show that this item of the claim was ever presented by appellant to the Secretary of the Navy or to the President of the United States, who, by paragraph nineteenth of the contract (R. 17), were made final arbitrators as

to any doubts or disputes as to the meaning of anything in the contract, and their decision was to be final and conclusive. For this reason, as heretofore discussed in connection with item (a), we submit that because of appellant's failure to avail itself of such remedies it can not now be heard to complain in the courts.

(c) Reimbursement for the sum of $4,000.76 for the alleged proper portion of appellant's cost and expense for superintendents' and officers' salaries, together with a 10% profit thereon

Paragraph sixteenth of the contract provides as an item of cost that should be allowed (R. 14)—

> (c) A proper proportion of running expenses, including * * * management, salaries, and other indirect charges.

It is assumed that this item is claimed under the above quoted provisions of the contract. This claim was also submitted to and rejected by the Compensation Board. (R. 23.) The record does not show—

1. That such sum was in fact spent;
2. That if spent, it was necessary;
3. That the Government had not already paid a proper proportion of such expense in other allowances.

Can it be said in the absence of these or other facts which might be suggested, that the action of the Compensation Board was so grossly erroneous or mistaken as to imply bad faith?

It is submitted for the reasons heretofore stated in discussing the other items that the action of the Compensation Board in rejecting this item was final and conclusive, and not subject to reveiw by this Court.

The record does not show that this item was ever presented to the Secretary of the Navy or to the President, who were arbitrators of all questions or disputes concerning the contract, and whose decision by the contract was made final and conclusive. For the reasons which have been heretofore discussed in connection with the other items, because of appellant's failure to avail itself of this remedy provided in the contract, the appellant can not now be heard to complain in the courts.

(d) Compensation in the sum of $1,335.70 representing 10% of the actual cost in the payment by appellant of retroactive wages pursuant to a decision of the Shipbuilding Labor Adjustment Board

The contract provides for the payment of cost plus a 10% profit. (R. 14.) The payment of wages is certainly a part of the cost, and is expressly made so by Section (a) of paragraph sixteenth, which in enumerating the items of cost states "(a) the cost of labor * * *." (R. 14.) The record, however, does not show that appellant in fact ever paid any of the amounts upon which it now claims a profit. It does not show but what, if the same were

paid by appellant, they were improperly paid and should not have been charged as a part of the cost of the contract. Appellant may have made such improper payments through erroneous calculations, improper construction of the ruling of the Shipbuilding Labor Board, or for a variety of other reasons which may be suggested. The labor may not have been necessary for the building of the ship. The Government may have cared for this item if proper in other allowances. None of these matters are shown in the record. In their absence the courts will not say that the action of the Compensation Board, to whom decision upon such questions has been referred, is so erroneous or grossly mistaken as to imply bad faith. And in the absence of such a holding, the action by the Compensation Board in rejecting this item of the claim (R. 23) is final and conclusive.

It is not shown that this item of the claim was ever presented to the Secretary of the Navy or to the President of the United States who, by the contract, were made the final arbitrators of questions and disputes concerning the contract. Because of appellant's failure to avail itself of this remedy, it can not now be heard to complain in the courts. For these reasons this item of appellant's claim must be denied.

III

THE APPELLANT HAS FAILED TO PROVE THE ITEMS OF ITS CLAIM. THE FINDINGS OF THE COURT BELOW DO NOT CONTAIN ANY FACTS WHICH SHOW THAT THE APPELLANT LOST OR SUFFERED THE ITEMS FOR WHICH IT NOW MAKES CLAIM

As to item (a), the value of the use of ways during the period of time which it is contended the Government delayed in the delivery of materials, there are no facts which show the exact number of days that resulted from such delay. The court stated that the time which it fixed in its finding was approximate only, and that it was no basis for accurate determination. (R. 22.) The reasonable value of the use during any time does not appear in the record.

As to item (b), which is the claim for depreciation of facilities, there is no showing in the record that there was any depreciation, nor the amount thereof, if such depreciation in fact existed.

As to item (c), which is the claim for reimbursement for salaries of superintendents and managers, there is no showing in the record that any such expenditures were in fact made, nor the amount thereof, if they existed.

As to item (d), which is for a profit upon wages alleged to have been paid because of the retroactive character of a ruling of the Shipbuilding Labor Board, there is no finding that such wages

were actuallly paid; nor if paid as to the amount thereof.

It is submitted that even if appellant's claims were otherwise valid, they have not been sustained by evidence, and therefore the decision by the court below should be affirmed.

CONCLUSION

For the reasons heretofore stated, it is respectfully submitted that the decision of the Court of Claims should be affirmed.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.
HERMAN J. GALLOWAY,
Assistant Attorney General.

MARCH, 1926.

○

(14)

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 240

THE KENILWORTH COMPANY, APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

FILED JANUARY 5, 1925

(30,791)

(30,791)

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APPEAL FROM THE COURT OF CLAIMS

INDEX

	Original	Print
Record from Court of Claims	1	1
Petition	1	1
Exhibit "A"—Articles of agreement	13	8
"B"—Provisions of contract	17	11
"C"—Supplemental agreement	21	14
General traverse	25	16
Amendment to petition	25	16
Argument and submission	25	16
Findings of fact	26	17
Conclusion of law	34	25
Appendix "A" to court's findings	34	25
Appendix "B" to court's findings	39	30
Opinion, Booth, J.	45	37
Judgment	51	43
History of proceedings after judgment	51	43
Petition for appeal	52	43
Order allowing appeal	52	44
Clerk's certificate	53	44

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[fol. 1]

IN COURT OF CLAIMS

No. C-762

THE KENILWORTH COMPANY

v.

THE UNITED STATES

I. PETITION—Filed June 20, 1923

To the Chief Justice and Judges of the Court of Claims:

Your petitioner, The Kenilworth Company, respectfully shows to your Honors the following facts:

I

Petitioner is a corporation duly organized and existing under the laws of the State of North Carolina, owning valuable property on the outskirts of the city of Asheville, in said State, consisting of a hotel and about ten and one-half acres of land, highly improved with roads, driveways and planting. Petitioner has always borne true faith and allegiance to the United States Government and never aided or abetted war or rebellion against that Government.

II

Said city of Asheville and the country thereabouts having an exceedingly pleasant and salubrious climate, the city, with its immediate environs, is and for many years has been, a famous resort, both of pleasure seekers and of invalids seeking restoration to health. On the land owned by petitioner there stood, for some twenty years before petitioner acquired the property, a large and handsome hotel known as the "Kenilworth Inn," famous throughout [fol. 2] the country for its excellent appointments and service, as well as its admirable location, which hotel was patronized by persons of wealth and refinement, who demanded a very high degree of comfort and luxury and all possible security and safeguards for their health. Said hotel was one of a few hotels of high class in and near said city in which persons known or suspected to be ill of tuberculosis or any contagious or obnoxious disease were not entered or admitted. Said original "Kenilworth Inn" was destroyed by fire in the year 1909, and petitioner, having acquired the property in 1916, built and equipped the present hotel, which is also known as the "Kenilworth Inn" in the years 1916 and 1917, expending thereon the sum of eight hundred and fifteen thousand dollars ($815,000); the replacement value of which said hotel was, at the times hereinafter referred to, as your petitioner is advised,

informed and believes, more than one million, five hundred thousand dollars ($1,500,000). Said present "Kenilworth Inn" was designed and constructed solely for the entertainment of persons, having ample means, who traveled, and patronized hotels of the best class, for pleasure and luxurious living, and it was petitioner's purpose that no person suffering with contagious or obnoxious diseases of any nature should be entertained or received in said hotel under any circumstances.

III

During the fall of the year 1917, and when said "Kenilworth Inn" building was nearing completion and petitioner was making plans and preparations for opening said hotel as such on or before the 1st day of January, 1918, petitioner was approached by representatives of the United States Government with a view to procuring a lease [fol. 3] on said hotel and premises for use as a hospital for disabled officers and soldiers, and, pursuant to the negotiations between petitioner and authorized officers and agents of the United States Government petitioner, by a contract entered into on or about the 21st day of January, 1918, with the War Department of the United States government, leased said "Kenilworth Inn" and premises to the United States, for use as a hospital until the 30th day of June, 1918, at a rental of nine thousand five hundred eighty-three dollars and thirty-three cents ($9,583.33) per month, a copy of which contract of lease, excepting only the formal parts, is attached hereto marked "Exhibit A" and made a part hereof. Two similar contracts, in renewal of the original contract, were thereafter signed between petitioner and such officers and agents of the United States Government, which said renewal contracts were identical with said original contract except as to dates and the amounts of the rent. The stipulated terms thereof expired successively on June 30, 1919, and June 30, 1920.

IV

On account of conditions existing in said city of Asheville and vicinity, resulting from its dual reputation and fame as a resort for both health and pleasure seekers, of which the agents and officers of the United States Government negotiating said lease were fully advised, no hotel could be successfully operated in said vicinity unless it established and strictly enforced the rule that no person suffering with tuberculosis or any contagious or obnoxious disease could, under any circumstances, be housed or entertained therein, and, unless the reputation of a hotel in said vicinity was zealously guarded and protected in this respect its value as a hotel would be destroyed. At [fol. 4] the outset of the negotiations between said officers and agents of the United States and the officers of petitioner, from which the contract of lease hereinbefore referred to resulted, the officers of petitioner stated and made known to said officers and agents of the United States that any lease made of said "Kenilworth Inn" and premises must be made subject to the distinct condition, under-

standing and agreement that no person suffering with tuberculosis or any contagious or obnoxious disease could be housed and treated in said building, and an original proposal of petitioner, dated December 11, 1917, made at the request of, and addressed to, the War Department of the United States, contained the following provision:

"The building and property are to be leased to the Government for the purpose of a convalescent hospital for disabled officers or soldiers, but it is especially understood, and the lease shall so provide, that no part of the property shall be used for the purpose of treating or housing any person suffering from tuberculosis in any form, or from smallpox, or any other like contagious or obnoxious disease, provided, however, that this shall not apply to a person suffering from tuberculosis housed temporarily in said premises for an operation or the like."

In submitting the aforesaid proposal to the War Department for the lease of Kenilworth Inn, the president of petitioner transmitted with the same a letter dated December 11, 1917, addressed to the Surgeon General, War Department, containing the following provision:

"Restriction Against Tuberculosis

"The restriction in the use of the property against the housing or treatment of patients suffering from tuberculosis, is from our stand-[fol. 5] point as the owners and future operators of the hotel, necessary, as such a use would forever destroy the property for the purpose for which it was constructed. The question of our ability, under proper medical advice, to renovate and disinfect the premises, thereby removing all danger of infection, does not arise—the danger of infection could no doubt be altogether removed, but it would cost us a fortune in advertising to convince the traveling public of this fact, and even with such an expenditure there would be no assurance of success in the undertaking. The same applies with equal and even more force to other contagious diseases of the character of smallpox, etc."

The contract of lease, hereinbefore referred to, though negotiated, and its terms and conditions agreed upon, by the officers of the Department of the Surgeon General of the United States Army in Washington, was signed and executed with the Quartermaster of the Army, Southeastern Department, at Charleston, to whom the proposals, after being approved and accepted by the proper officials of the Government, had been referred for the purpose of executing the formal contract required by law. Said Departmental Quartermaster, under date of January 17, 1918, wrote and transmitted to petitioner a letter, asking that it restate the proposed restriction against the treatment of persons suffering with tuberculosis or contagious diseases, and in response petitioner replied, in writing, under date of January 19, 1918, as follows:

"In obedience to your request contained in your letter of the 17th instant, we beg to restate Paragraph 2 of our proposal to the Surgeon General for the leasing of Kenilworth Inn, making the same to read as follows:

" '(2) The building and property are to be leased to the Govern-[fol. 6] ment for the purpose of a convalescent hospital for disabled officers and soldiers, but it is especially understood, and the lease shall so provide, that no part of the property shall be used for the purpose of receiving for treatment any persons suffering from tuberculosis in any form, or from smallpox, or any other like contagious or obnoxious disease; provided, however, that this shall not apply to a person suffering from tuberculosis, housed temporarily in said premises, for the purpose of an operation or the like.' "

Said original contract of lease, Exhibit A hereto, and all contracts in renewal thereof, made by the War Department of the United States Government, contained the following stipulation and provision:

"That the building and property are leased to the Government for the purpose of a convalescent hospital for disabled officers and soldiers, but it is especially understood that no part of the property shall be used for the purpose of receiving for treatment any person suffering from tuberculosis in any form, or from smallpox, or any other like contagious or obnoxious disease; provided, however, that this shall not apply to a person suffering from tuberculosis housed temporarily in said premises, for the purpose of an operation or the like."

V

Almost immediately after the War Department of the United States took possession of said Kenilworth Inn and premises, and began its operation as a hospital, the United States, in violation and total disregard of the express terms and conditions of said contract of lease, received and housed for prolonged treatment in said building, a great number of persons suffering from tuberculosis and contagious and obnoxious diseases, and kept and maintained said per-[fol. 7] sons in said building in large numbers and for prolonged periods; and this misuse of the property and violation of the terms and conditions of said lease, in spite of the earnest objections and protests of petitioner and its insistence upon the removal of said forbidden patients, continued during the entire term of the occupancy of the property by the War Department, under its original lease and the two successive renewals thereof.

VI

In addition to the treatment in said building for prolonged periods of officers and soldiers suffering with tuberculosis and contagious and obnoxious diseases, the Government, in violation of the terms of said contract, and over the objections and earnest protests

of petitioner, and in total disregard of its rights under said contract, housed and treated in said building a large number of German interned prisoners, who were at the time suffering with a malignant type of typhoid fever, and a large number of whom died while being so housed and treated in said inn.

VII

Under date of February 3, 1919, and during the time of the violation of the contract hereinbefore referred to, petitioner addressed and transmitted to the Surgeon General of the United States Army, a letter of protest in the following language:

"Somewhat to our surprise, we find that your department, in violation of the terms of the contract of lease made by our company with the United States Government, has been using Kenilworth Inn for the treatment of tuberculosis, typhoid fever, and other obnoxious and contagious diseases.

[fol. 8] "In view of the fact that at the time the Government took this property for hospital purposes we vigorously protested against the taking of the property if it was to be used for the treatment of such diseases, and in view of the fact that the Government at that time recognized the justness and reasonableness of our position in the matter and inserted a provision in the contract of lease prohibiting the treatment of such diseases in the building, we were very much surprised at the information that such diseases had been treated there for some time and that quite a number are still being treated in the hospital.

"This property was built primarily for a resort hotel, and the fact that such diseases have been treated in the building, in violation of the Government's contract, will render the property virtually valueless to the owner for some time to come.

"We assume, of course, that this action on the part of the Government was knowingly done, and that they will expect to make a proper adjustment of the injury to the property, and we would appreciate it if you would advise us as to what the decision of your department is in the matter."

Following said letter, the president of petitioner, being alarmed at the continued disregard by the Government of the terms of said contract, and being alarmed at the resulting destruction of the value of said property of your petitioner, employed, at great expense, able and influential counsel and in company with said counsel he came to the city of Washington, and earnestly protested to the Surgeon General of the Army and to the Secretary of War, in person, against the misuse of said property and breaches of said contract, and thereupon the Surgeon General and Secretary of War assured him that just compensation would be made to petitioner for the resulting damage.

[fol. 9]

VIII

Petitioner did not at any time consent, either expressly or by its silence, to the wrongful use of said property; but, on the other hand, at all times it vigorously and earnestly protested against said wrongful use, and did all in its power to procure a discontinuance thereof.

IX

Before the expiration of the last petitioner's said contracts, said hotel property was turned over by the War Department to the Treasury Department, for the use of the Public Health Service. This was done under a contract executed between petitioner and the Secretary of the Treasury, becoming effective on the 8th day of November, 1919, and by its terms extending for five years from that date. A copy of the provisions of said contract is attached hereto, marked "Exhibit B," and made a part hereof. Under said contract said Health Department held and used said property until the 31st day of December, 1922. Said contract included various and sundry residences and property not owned by petitioner, but which were rented and procured by petitioner and included in said contract for the convenience of the Government. The actual rental paid by the United States and received by petitioner for said Kenilworth Inn property alone was seventy thousand dollars ($70,000.00) per annum, to November 9, 1922.

X

During its said tenancy of said property, the Public Health Service received and maintained and treated therein many tubercular patients and others suffering from other contagious or offensive diseases.

[fol. 10]

XI

Said tenancy of said property by the Public Health Service was terminated by a contract signed between petitioner and the Director of the Veterans' Bureau as of the 10th day of November, 1922, under which petitioner was to resume possession, and it did resume possession of said property on the 1st day of January, 1923. A copy of the provisions of said contract is hereto attached, marked "Exhibit C," and made a part hereof. Under the terms of said contract, the United States paid, and petitioner with respect to said Inn property received, only the sum of twenty-seven thousand, one hundred eighty-eight dollars and eighty-eight cents ($27,188.88) rental, the balance of the amount paid under said contract being to cover certain repairs and replacements agreed upon, and rental on the aforesaid property not owned by petitioner, but included in the last mentioned contract for the convenience of the Government.

XII

As a result of the treatment in said Kenilworth Inn, by the War Department of the Government, of persons suffering with tuberculosis and persons suffering with other obnoxious and contagious diseases, all of which said facts were generally and widely known in and around Asheville and throughout the country, the reputation of said Kenilworth Inn as a tuberculosis hospital was during the years 1918 and 1919 firmly established with the traveling and pleasure-seeking public, and as a result its value as a hotel, for which it was designed and constructed, was almost if not completely destroyed; and such reputation still continues. By reason of said damage to its reputation, the rental value of said property now is, and for the five years following after December 31, 1922, will be [fol. 11] eighty thousand dollars ($80,000.00) per annum less than it would have been but for such injury; and the market value is diminished not less than four hundred thousand dollars ($400,000.00). The cost of restoring it fully to the condition in which the War Department received it from petitioner, by fumigation, tearing out and replacing of interior walls, plaster, decorations, plumbing and equipment, would have been three hundred and twenty-five thousand dollars ($325,000.00).

XIII

Said Kenilworth Inn property could not be used, and is of no material comercial value except for the purpose for which it was designed and constructed, namely, a resort hotel. One of the busiest and most prosperous seasons for the hotel trade in and about said city of Asheville was and is March, April and May. Upon resuming possession of its said building on January 1, 1923, as narrated hereinbefore, petitioner made haste to, and did, repair the same so far as was possible and furnished and equipped it adequately, and on the 17th day of March, 1923, opened it, and since has conducted it, as a hotel. The time was not sufficient, nor was petitioner financially able to reconstruct the interior of the building, to the extent indicated in paragraph XII hereinbefore, in order to restore it fully to the condition in which the War Department received it in 1918. But, beside repairing the breakage and other damage with respect to which it had received thirty-one thousand, four hundred sixty-two dollars and three cents ($31,462.03), it spent a large amount in removing factors of contagion with said infectious and obnoxious diseases and evidences that such diseases had been housed and treated therein. The purpose of this opera- [fol. 12] tion of the property was to gain publicity for it and, as far as possible, to cause the public to forget that it had been used in the housing and treatment of tubercular and other contagious and offensive diseases, and petitioner had no hope that such operation of the property could be conducted without a serious money loss. In reality the business so inaugurated, although conducted

with skill and reasonable economy, has constantly lost mu money, and for a long time it necessarily will entail such loss.

Petitioner prays judgment against the United States in the su of six hundred thousand dollars ($600,000.00); the same bei entirely unpaid and petitioner's claim thereto not having bee assigned wholly or in part.

The Kenilworth Company, by Benj. Carter, Attorney i Fact. Junius G. Adams, Benj. Carter, Attorneys f Claimant.

Duly sworn to by Benj. Carter. Jurat omitted in printing.

[fol. 13] EXHIBIT A TO PETITION

These articles of agreement, Entered into this 21st day of January 1918, between K. J. Hampton, Lt. Col. Quartermaster Corps, U. S Army, for and in behalf of the United States of America (herein after designated as lessee), of the first part, and The Kenilworth Com pany (a corporation existing under the laws of the State of North Carolina), of Asheville, in the County of Buncombe, and State o North Carolina (hereinafter designated as lessor), of the secon part, witness:

That the said parties do hereby mutually covenant and agree t and with each other as follows:

1. That the said lessor shall, and by these presents does hereby lease, demise, and let to the lessee the following described premises, to have and to hold the same with their appurtenances unto the lessee, for the term beginning with February 1, 1918, and ending with June 30, 1918, at the rate per month and under the conditions named below, viz: The property known and described as Kenilworth Inn and the grounds thereof in the Town of Kenilworth, near the City of Asheville, County of Buncombe, State of North Carolina, as shown on the plot hereto attached and made a part hereof, same containing approximately four acres of land, and described as follows:

Beginning at stake on south bank of Swannanoa River, n. 10 deg. 2 5 min., w. 212 feet, thence s. 62 deg. 52 min. w. 50 feet, thence n. 9 deg. 35 min. w. 195 feet, thence n. 49 deg. 14 min. e. 542.03 feet, thence n. 23 deg. 40 min. w. 140 feet to east side of drive south and west of main building; thence along east side of drive 42 deg. 45 min. w. 65 feet, n. 5 deg. 01 min. w. 75 feet, n. 9 deg. 14 min. e. 85.55 feet, n. 9 deg. 53 min. w. 25.54 feet, n. 23 deg. 47 min. w. 57.1 feet, n. 38 deg. 47 min. w. 173.5 feet and n. 14 deg. 53 min. e. 72.1 feet to a point on south side of drive in rear of main building, thence along south side of drive, n. 70 deg. .05 min. e. 82.35 feet, thence n. 15 deg. 55 min. w. 600 feet to south side of Calendonia Road, thence along south side of Calendonia Road 87 deg. 48 min. e. 80 feet, n. 76 deg. [fol. 14] e. 86.5 feet, n. 67 deg. 28 min. e. 88.9 feet, and n. 42 deg. 25 min. e. 60 feet, and n. 42 deg. 25 min. e. 60 feet, to intersection

with west side of Woodland Road, thence along west side of Woodland Road s. 12 deg. 15 min. e. 142 feet, s. 57 deg. 45 min. 142 feet, s. 6 deg. e. 78 feet, s. 16 deg. 45 min. w. 63.05 feet and s. 18 deg. 50 min. e. 197.07 feet to southeast side of Calendonia Road, thence along southeast side of road, n. 67 deg. 37 min. e. 136.36 feet, thence s. 63 deg. 40 min. e. 251.31 feet to northeast side of road, thence along side of road s. 37 deg. 30 min. e. 130.05 feet to line of southeast side of road, thence crossing road and following southwest side of road s. 15 deg. 15 min. e. 136 feet, s. 35 deg. 50 min. w. 200 feet, s. 12 deg. 10 min. w. 215 feet, s. 16 deg. 13 min. w. 102 feet, s. 27 deg. 13 min. w. 99.5 feet, s. 11 deg. 43 min. w. 98.3 feet, s. .5 degree. 20 min. e. 109.5 feet to angle in road, thence s. 15 deg. 20 min. e. 190 feet to south side of Swannanoa River, thence along the south side of river in a westerly direction, 1,010 feet, to point of beginning.

That the aforementioned Kenilworth Company has completed the erection of Kenilworth Inn in accordance with the plans and specifications, which were submitted to the Surgeon General of the Army, except that no partitions or dividing walls, indicated in red on said plans, shall be installed. It being understood that all heating equipment and lighting fixtures are to be installed in the building, but the aforementioned Kenilworth Company shall not provide any furniture or operating equipment.

That the building and property are leased to the Government for the purpose of a convalescent hospital for disabled officers and soldiers, but it is especially understood, that no part of the property shall be used for the purpose of receiving for treatment any person suffering from tuberculosis in any form, or from smallpox, or any other like contagious or obnoxious disease; provided, however, that this shall not apply to a person suffering from tuberculosis housed temporarily in said premises, for the purpose of an operation or the like.

That the Government shall maintain all buildings, equipment and machinery in good condition and repair and that at the termination [fol. 15] of the lease deliver the same up to the aforementioned Kenilworth Company, in as good condition and repair as when leased, usual wear and tear and acts of God to be excepted.

That the Government shall pay to the aforementioned Kenilworth Company for the use of the aforementioned property, a monthly rental of Nine Thousand, Five Hundred Eighty-three Dollars and Thirty-three Cents ($9,583.33) for each month of the term hereof and should the Government desire to renew the lease as provided for under Article 9 hereof it shall pay a monthly rental of Nine Thousand, Five Hundred Eighty-three Dollars and Thirty-three Cents ($9,583.33) for the first seven months of said renewal term and a monthly rental of Six Thousand Two Hundred Fifty ($6,250.00) Dollars for each month thereafter for said renewed term, to be paid in accordance with Paragraph 4 hereof.

2. That said lessor will warrant and defend to the lessee, its officers and agents, the quiet and peaceful possession and occupancy

of the aforesaid premises, and in case of any disturbance, by suit or otherwise, will defend the same free of charge to the Government in or before the proper State or United States Courts.

3. That the said lessor shall keep said premises in good repair to the satisfaction of the Government officer in charge. All buildings and other improvements fixed to or erected or placed in or upon the said premises by the lessee shall be and remain the exclusive property of the lessee; provided, however, that the same, unless sold or otherwise disposed of, shall be removed by the lessee within 90 days after the said premises are vacated under this lease.

4. That for and in consideration of the faithful performance of the stipulations of this agreement, the lessee shall pay to the said lessor or agent the sum or sums stated in Article 1 hereof. Payment shall be made at the end of each calendar month, or as soon thereafter as is practicable, at the office of the contracting officer or by a disbursing officer designated, in funds furnished for the purpose by the Government. Should the premises be relinquished before the [fol. 16] close of the monthly period, the rental for the last period shall be only the pro rata part of the monthly rental, depending upon the time of occupancy.

5. That it is expressly agreed and understood that this lease shall be non-effective until an appropriation adequate to its fulfillment is granted by Congress and is available, except in so far as is necessary to provide for the necessities of the service as authorized by Section 3732 of the Revised Statutes of the United States. However, in order to provide for the necessities of the service as authorized by said section, it is agreed that the premises specified herein, so far as authorized by said section, shall be occupied by the lessee as contemplated by this lease, and that payment of the rental shall be made as soon as is practical after funds are appropriated and are available.

6. That no Member of or Delegate to Congress, or Resident Commissioner, nor any person belonging to or employed in the military service of the United States, is, or shall be admitted to any share or part of this contract, or to any benefit which may arise herefrom, but under the provisions of Section 116 of the Act of Congress approved March 4, 1909 (35 Stat. L., 1109), this stipulation, so far as it relates to members of or delegates to Congress or resident commissioners, shall not extend, or be construed to extend, to any contract made with an incorporated company for its general benefit.

7. That the lessor hereby stipulates that no part of the money received as rental will be given to the occupant of the above-described premises, or to the person for whose benefit or use they were hired, or to any one for him, nor will any rebate be given on said rental for the benefit of any such person.

8. That the lessee reserves the right to quit, relinquish and give up the said premises at any time within the period for which this lease is made or may be renewed, by giving to the said lessor or agent — days' notice in writing.

9. That, at the option of the lessee, this lease, with all its covenants and agreements, may be renewed yearly as often as the needs of the [fol. 17] public service may require, so as to give the lessee continuous possession of the premises, not extending, however, beyond one year after a treaty of peace has been signed between the United States and Germany, but no renewal shall be made to include more than one fiscal year.

In witness whereof, the parties aforesaid have hereunto placed their hands the date first hereinbefore written. The officer of the United States whose name is signed below certifies that the rate stated in this lease is not in excess of the commercial rental value of the premises named and that said rate is the amount to be actually paid to the lessor for their own use, and that there are no public buildings, quarters, or ground available for use as specified in this lease, and that the rate stipulated in this lease is a fair rental value of reasonably good premises suitable for the purposes stated herein, in the locality where situated.

Exhibit B to Petition

The Treasury Department, for and in behalf of the United States of America (hereinafter designated as lessee) of the first part, and the Kenilworth Company, of Asheville, North Carolina (hereinafter designated as lessor) of the second part, do hereby covenant and agree to and with each other as follows:

1. That the said lessor shall, and by these presents does hereby lease, demise and let to the lessee the following-described premises, to have and to hold the same with their appurtenances unto the lessee for the term beginning with November 8, 1919, and ending with November 8, 1924, at the rates per annum and under the conditions hereinafter named, viz:

2. All those certain lots, blocks and parcels of land situate, lying and being in the town of Kenilworth, in the County of Buncombe, and State of North Carolina, and being more particularly bounded and described as follows:

(a) Beginning at a stake in the southern margin of Calendonia Road, at the extreme northern corner of the Myers property, and [fol. 18] running thence with the eastern and southern margin of Calendonia Road in a northerly and easterly direction to the northwest corner of Lot No. 10 of Block K, of the Kenilworth plat; thence crossing Calendonia Road to the northwest corner of Lot No. 12 of Block F, the same being in the southern margin of Forest Road, * * *

(b) That certain tract or parcel of land containing 10.5 acres, known as the hotel site tract, lying to the east and south of the extension of Calendonia Road, upon which the Kenilworth Inn is

situated, and also the following lots with residences, buildings and other improvements thereon; Lots Nos. 9, 11, 14 and 24 of Block E of the plat of the property of the Kenilworth Development Company. Lots Nos. 1, 6 and 16 of Block F of said plat; Lots Nos. 1, 2 and 3 of Block K of said plat, and Lots Nos. 75, 76, 77, 78, 79, 95, 96 and 97 of the Hotel Block of said plat.

Excepting and reserving from this proposal a small triangle in the northeast corner of said Lot No. 11, described as follows: Beginning at a stake in the southern margin of Chiles Avenue at the northeast corner of said lot and runs thence with the eastern line of said lot s. 3 deg. 43 min. e. 100 feet to a stake in the same; thence n. 18 deg. .08 minutes w. 100 feet to a stake in the southern margin of Chiles Avenue; thence with said margin of Chiles Avenue n. 72 deg. 15 min. e. to the beginning.

3. The United States shall take possession of all lands and buildings thereon in their present condition and state of repair without obligation on the part of the lessor to alter, improve, or repair the same at its own expense; should the lessee request the lessor to alter, improve, or repair the premises, the lessor hereby agrees to do same to the satisfaction of the Surgeon General of the Public Health Service within a reasonable time to be set by that officer, at the expense of the lessee, under the provisions of Paragraph 4, Clause b. The lessee at the end of this lease, by lapse of time or otherwise, shall yield up said premises in good condition, ordinary wear and tear, fire, elements, and acts of public enemy excepted, subject to the provisions of Paragraph 8 hereof.

[fol. 19] 4. The United States of America shall pay to the said Kenilworth Company as rental for said property during said term of five years the sums hereinafter stated, payable in 60 equal installments, paid at the end of each calendar month or as soon thereafter as is practicable:

For the property embraced in Proposal (a)..... $86,000
For the property embraced in Proposal (b)..... 444,000

and reimbursement forthwith of (1) the actual cost of any alterations in the demised premises or of any improvements (the cost of which improvements shall *shall* not exceed ($100,000) that may be placed thereon by the lessor at the request of the lessee, and (2) the actual cost of replacing the property in the same shape and condition as at the time the Government took possession, ordinary wear and tear, fire, elements, and acts of public enemy excepted. Provided, that the extent of such restoration and the costs of same, as well as the costs of the alterations and improvements referred to in this paragraph, shall be ascertained by the Surgeon General, Public Health Service, whose decision shall be binding on both parties hereto; and, provided, also, that the Government shall not be liable for any rent during such time as such restoration may continue after the date the Government vacates the property.

5. If during the term hereinbefore specified, any of the buildings or improvements on the demised premises shall be destroyed by fire, or other casualty, or shall, from any cause not the fault of the lessee, become untenantable or unfit for occupancy in the judgment of the Surgeon General of the Public Health Service, the rental hereinbefore specified shall be reduced annually by a sum equal to 10% of the value of the buildings or other improvements so destroyed or rendered untenantable and of the sites thereof, which vacated sites shall then become subject to the provisions of Proposal (a); provided, however, that in case the United States exercises its option to purchase the entire property, said vacated sites shall come within [fol. 20] the provisions of the 33⅓% "credit and remittance" clause of Proposal (b) for such period as the buildings were tenantable by the lessee; and the option price hereinafter specified shall be reduced by an amount equal to the value of the said building or improvement; but there shall be no obligation on the part of the Kenilworth Company to rebuild or replace such destroyed or untenantable buildings or improvements except as to the hotel building and the power house serving the same, and failing the restoration of the last named buildings, or either of them, within a time to be set by the Surgeon General of the Public Health Service, this agreement may be canceled at the option of the lessee.

6. The United States shall have the right and option to purchase said property at any time during the said term of five years on the following terms and conditions:

Property included in Proposal (a)	$287,000.00
Property included in Proposal (b)	888,000.00

and the Kenilworth Company shall credit and remit to the United States of America an amount equal to thirty-three and one-third per cent of the total rent paid for said property, mentioned and described in this proposal, up to the date of the payment of the purchase price therefor, thereby reducing the purchase price by an amount equal to thirty-three and one-third per cent of the amount of the rent so paid.

The United States shall not acquire or attempt to acquire any part or parcel of said land and premises less than the whole included within the two said proposals, or at prices less than stipulated above, which, after a careful and exhaustive investigation and examination by the agents of the Treasury Department, has been fixed and ascertained as the reasonable and fair market value of said property.

7. Should the United States of America exercise its option to purchase said lands as hereinbefore provided, the rental hereinbefore reserved and agreed to be paid shall cease from and after the date of the actual payment of the purchase price of said lands.

[fol. 21] 8. Should the United States fail to exercise its option to purchase, as hereinbefore provided, all buildings and other improvements fixed to or erected or placed in or upon the said premises at the instance of the lessee shall be and remain the exclusive property of the lessee; provided, however, that the same, unless sold or other-

wise disposed of, shall be removed by the lessee within ten days after the said premises are vacated under this lease.

9. The said lessor will warrant and defend to the lessee, its officers and agents, the quiet and peaceable possession and occupancy of the demised premises, and in case of any disturbance, by suit or otherwise, will defend the same free of charge to the Government in or before the proper State or United States Courts.

10. That no Member of or Delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this contract, or to any benefit which may arise therefrom.

11. Should the United States of America exercise its option to purchase said land as hereinbefore provided, The Kenilworth Company agrees to furnish to the United States Attorney for the Western District of North Carolina, promptly upon receipt of notice and without any additional expenses to the United States of America, an accurate survey of the property hereinbefore described and included within the terms of this proposal, prepared in accordance with the specifications therefor of the Treasury Department, as well, also, all requisite abstracts, official certifications and evidences of title necessary in the opinion of the Attorney General of the United States to vest in the Government a good and valid title to said property, free and clear of all liens and encumbrances whatsoever.

Exhibit C to Petition

Supplemental articles of agreement made and entered into this tenth day of November, A. D. 1922, by and between The Kenilworth [fol. 22] Company (of Biltmore, N. C.), a corporation created, organized, and existing under the laws of the State of North Carolina, party of the first part, and the United States of America, by C. R. Forbes, Director, U. S. Veterans' Bureau, party of the Second part:

Witnesseth:

That, whereas, the party of the first part, by two formal, duly-executed instruments in writing—one dated November 19, 1919, and the other dated July 26, 1920—leased to the United States of America (represented by an Assistant Secretary of the Treasury), for use of the United States Public Health Service, for hospital purposes certain lots, blocks, and parcels of land, with appurtenances, structures, fixtures, and rights thereunto belonging, situate, lying, and being in the Town of Kenilworth, North Carolina, to which said respetive leases reference is hereby made and the same made a part hereof as though fully set forth herein; and,

Whereas, occupancy and use, for hospital purposes, of said demised premises have been continuously exercised to the present date by the said lessee, under color of said leases, through and by its lawful instrumentalities, as follows:

(a) By the U. S. Public Health Service, a bureau of the Treasury

Department, from initial occupation under said leases to and including April 30, 1922; and,

(b) Thereafter, on and from May 1, 1922, by the U. S. Veterans' Bureau, in accordance with the specific mandatory provisions of Executive Order of April 29, 1922, transferring, as of May 1, 1922, the supervision, management, and control of said premises (known as U. S. Veterans' Hospital No. 45), to the Director, U. S. Veterans' Bureau; and,

Whereas—in view of the availability and proximity of other functioning government-owned or leased hospitals; of the cost per day, per bed, in said Hospital No. 45 of approximately Six Dollars ($6.00), which is in excess of such cost at other hospitals of the U. S. Veterans' Bureau, and therefore uneconomical—it is advan-
[fol. 23] tageous to the party of the second part to vacate said premises at the earliest possible date; and,

Whereas, by the terms, provisions and conditions of said leases the rental obligation and liability of the said party of the second part in the absence of a formal renewal for the ensuing fiscal year, extends to and terminates on June 30, 1923, in amount of approximately seventy-two thousand two hundred sixty-six one-hundredths ($72,266.66), and said party of the second part, upon vacation of said demised premises, is obligated to make restoration as specified in aforementioned lease instruments, and remove or sell "all buildings and other improvements fixed to or erected or placed in or upon the said premises," by it; and,

Whereas, after careful, detailed, and conjoint examination of said premises, and by mutual agreement between the parties hereto, the actual cost of all restoration in and to said premises for which the party of the second part is liable under said leases has been determined and fixed at thirty-one thousand four hundred sixty-two and three one-hundredths dollars ($31,462.03), making a total liability of the said lessee up to June 30, 1923, of approximately one hundred three thousand seven hundred twenty-eight and sixty-nine one-hundredths dollars ($103,728.69), and,

Whereas, it is desired that certain refrigerating, kitchen, and hydro-therapy equipment, property of the party of the second part, now installed in said hospital, be purchased by the party of the first part, in order to reduce the restoration liability of the party of the second part, and the incident cost of removal, transportation, etc., and the present cash value of said equipment has been mutually determined and fixed by the parties hereto at Four Thousand Five Hundred Dollars ($4,500.00) and

Whereas, it has been mutually agreed by and between the parties hereto that the liability for fixed rental to June 30, 1923, should be materially reduced by reason of vacation of said premises by December 31, 1922:

[fol. 24] Now, therefore, in consideration of the premises; the vacation by party of the second part of the said demised premises on December 31, 1922; the discharge of the United States from all liability for fixed rental under said leases, from and after January 1, 1923, and from restoration of premises as required by said basic leases; and agreement of lessor to purchase the specified refrigerating,

kitchen, and hydrotherapy equipment for the sum of Four Thousand Five Hundred Dollars ($4,500.00) to apply in diminution of amount fixed as restoration, it is hereby mutually agreed by and between the parties hereto that said leases of November 19, 1919, and July 26, 1920, are hereby amended so that the termination thereof shall be on and as of December 31, 1922, and that rental thereunder for the period November 1, 1922, to December 31, 1922, shall be, and is hereby fixed, at seventy-two thousand one hundred twenty-eight and seventy one-hundredths dollars ($72,128.70), payable in two equal monthly installments in arrears.

Party of the first part, in consideration of the terms, provisions, and conditions of this Supplemental Agreement, hereby releases the party of the second part, its officers, agents, servants, and employees, all and singular, from any and all claims or demands of every name and nature, except the rental hereinabove provided, directly or indirectly arising from, connected with, or incident to, occupancy and use of said premises and property under said leases, and this Supplemental Agreement.

[fol. 25] General Traverse—Filed Aug. 20, 1923

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendant, a general traverse is entered as provided by Rule 34.

III. Amendment to Petition—Filed December 5, 1922

Claimant, by leave of court amends its petition by striking out the words "six hundred thousand dollars ($600,000.00)" in the last paragraph and inserting in lieu thereof "eight hundred and sixty-five thousand dollars ($865,000.00)."

Benj. Carter, Attorney for Claimant.

IV. Argument and Submission

On December 5, 1923, this case was argued and submitted on merits by Messrs. H. W. Kinder, Benjamin Carter and Junius C. Adams, for plaintiff, and by Mr. Herman J. Galloway, for defendant.

[fol. 26] V. **Findings of Fact, Conclusion of Law, Appendices "A" and "B," and Opinion of the Court by Booth, J.**—Filed January 21, 1924

This case having been heard by the Court of Claims, the court upon the evidence, makes the following

Findings of Fact

I

The plaintiff is, and was during the different transactions hereinafter set forth in these findings, a corporation duly incorporated as a stock company under the laws of the State of North Carolina for the purpose of carrying on the hotel business in said State, and as such was the owner of a tract of land located at Biltmore railroad station in the village of Kenilworth, one and a half miles from Asheville, North Carolina, on which a hotel, known as "The Kenilworth Inn," was constructed for the accommodation of 450 guests, at a cost of $815,000, of which $710,000 was borrowed on bonds maturing in 17 years.

II

On December 11, 1917, plaintiff proposed to the War Department to enter into a lease with the Government for the rent of the Kenilworth Inn and about four acres of ground for the duration of the present war and to terminate one year after the signing of a treaty of peace between the United States and Germany, the hotel to be completed in accordance with the plans submitted with said proposal, with certain indicated omissions of partitions, and the Government to pay a rent of $125,000 a year for the first year of said lease, and $75,000 a year for each additional year of said lease, payable semi-annually in advance. The proposal contained the following restriction upon the use of said building:

"(2) The building and property are to be leased to the Government for the purpose of a convalescent hospital for disabled officers or soldiers, but it is especially understood, and the lease shall so provide, that no part of the property shall be used for the purpose of treating or housing any person suffering from tuberculosis in any form, or from smallpox or any other contagious or obnoxious disease, provided, however, that this shall not apply to a person suffering from tuberculosis housed temporarily in said premises for an operation or the like."

[fol. 27] The plaintiff was informed by the proper officer of the Quartermaster Corps that the law in force prohibited the making of any lease by the Government extending beyond June 30, the end of the fiscal year, but that such lease might provide for extensions for an indefinite period, and in the present instance to one year after the making of a treaty of peace between the United States and Germany; that payment of rent in advance was also prohibited by law, and that the Government would not pay over $115,000 rent for the first year's use of the building; that the Government also objected to the use of the words "of treating" in the restriction upon the use of the building and suggested in lieu thereof the words "of receiving for treatment." The plaintiff was asked to restate its lease in accordance with the above suggestions. Accordingly, the plaintiff finally restated its proposal in the above particulars as follows:

"(2) The building and property are to be leased to the Government for the purpose of a convalescent hospital for disabled officers and soldiers, but it is especially understood, and the lease shall so provide, that no part of the property shall be used for the purpose of receiving for treatment any person suffering from tuberculosis in any form, or from smallpox, or any other like contagious or obnoxious disease, provided, however, that this shall not apply to a person suffering from tuberculosis housed temporarily in said premises for the purpose of an operation or the like."

"(4) The Government shall pay to this company for the use of said property a monthly rental of $9,583.33 for each month of the term thereof, and should the Government desire to renew said lease, it shall pay a monthly rental of $9,583.33 for the first seven months of said renewed term and a monthly rental of $6,250 for each month thereafter of said renewed term, the rent to be paid monthly on the first day of each month covering the rent for the calendar month just passed.

"(5) The term of the lease proposed to be executed shall commence on the first day of February, 1918, and end on the 30th day of June, 1918; but the Government shall have the right and privilege under the contract of renewing the lease from year to year, for and during the continuation of the present war with Germany, and for one year after a treaty of peace has been signed between the United States and the German Government. It is desired, but not insisted upon by this company, that the contract of lease contain a clause while not binding on the Government in specific terms to continue the lease in force for the duration of the war and one year, but at the same time stating that this is the spirit or understanding between the contracting parties."

The proposal to rent said hotel, amendments suggested by the Government and restated proposal are embraced in Appendix A to these findings and are made part of this finding by reference thereto.

The original proposal of December 11, 1917, was accompanied by a letter to the Surgeon General containing the following extract:

Restrictions Against Tuberculosis

"The restrictions in the use of the property against housing or treatment of patients suffering from tuberculosis is, from our stand- [fol. 28] point as the owner and the future operators of the hotel, necessary, as such a use would forever destroy the property for the purpose for which it was constructed. The question of our ability, under proper medical advice, to renovate and disinfect the premises and thereby remove all danger of infection does not arise—danger of infection could no doubt be altogether, but it would cost us a fortune in advertising to convince the travelling public of the fact, and even with such an expenditure there would be no assurance of success in the undertaking. The same applies with equal and even more force to other contagious diseases of the character of smallpox."

III

On January 21, 1918, the plaintiff entered into an agreement with an authorized officer of the Quartermaster Corps for the lease of the Kenilworth Inn and about four acres of land described by metes and bounds, the said lease to begin on February 1, 1918, and to end on June 30, 1918, with the stipulation, "That the building and property are leased to the Government for the purpose of a convalescent hospital for disabled officers and soldiers, but it is especially understood that no part of the property shall be used for the purpose of receiving for treatment any person suffering from tuberculosis in any form, or from smallpox, or any other like contagious or obnoxious disease, provided, however, that this shall not apply to a person suffering from tuberculosis housed temporarily in said premises for the purpose of an operation or the like," and "That the Government shall pay to the aforementioned Kenilworth Company for the use of the aforementioned property a monthly rental of nine thousand five hundred eighty-three dollars and thirty-three cents ($9,583.33) for each month of the term hereof, and should the Government desire to renew the lease as provided for under article 9 hereof it shall pay a monthly rental of nine thousand five hundred eighty-three dollars and thirty-three cents ($9,583.33) for the first seven months of said renewed term and a monthly rental of six thousand two hundred fifty dollars ($6,250) for each month thereafter for said renewed term. * * * Payment shall be made at the end of each calendar month, or as soon thereafter as is practicable. * * * Should the premises be relinquished before the close of the monthly period, the rental for the last period shall be only the pro rata part of the monthly rental, depending upon the time of occupancy.

The contract also provided that the Government at the termination of the lease should deliver all buildings, equipment, and machinery to plaintiff "in as good condition and repair as when leased, usual wear and tear and acts of God excepted," and that the said lease might be extended at the option of the Government yearly, beginning at the end of the fiscal year for each renewal, but not to extend beyond one year after the signing of a treaty of peace between the United States and Germany. The hotel at the date of this contract was in an unfinished condition.

The building was completed on April 9, 1918, at which time the Medical Corps of the Army first occupied the same as a hospital, designated as No. 12. The plaintiff at the date of the lease was in need of funds, and the Government in order to hasten the completion of the building paid the rent for February and March, 1918. [fol. 29] This rent the plaintiff afterwards refunded to the Government in the autumn of 1918. The builder, working on a cost-plus contract, had become financially involved, and the plaintiff had to complete the hotel. The Quartermaster Corps, by proper authority, renewed the said lease of January 21, 1918, to run from July 1, 1918 to June 30, 1919, and from July 1, 1919, to June 30, 1920.

Major William H. Smith, Medical Corps, was assigned to the

command of said hospital some time in February, 1918, and was succeeded on October 20, 1918, by Major John B. McCreary, Medical Reserve Corps, who appears to have remained in command until the hospital was transferred to the Public Health Service.

IV

On November 1, 1919, the plaintiff addressed a communication to the Secretary of the Treasury proposing to lease for five years beginning on November 8, 1919, the Kenilworth Inn, and the tract on which it was located, and certain other lots owned by the Kenilworth Development, with the residences, buildings, and other improvements thereon, for the sum of $444,000 as rental therefor, payable in 60 equal installments of $7,400 each, with an option on the part of the Government to purchase said property at any time during said term of five years for the sum of $888,000, with a provision that the Government should maintain said buildings, machinery, equipment, fixtures, and appurtenances in good condition and repair, usual wear and tear and acts of God excepted.

On the same date, November 1, 1919, the plaintiff wrote another letter to the Secretary of the Treasury proposing to lease for a term of five years beginning November 8, 1919, certain lots, blocks, and parcels of land in the town of Kenilworth and certain others upon which buildings and residences had been built, belonging to the Kenilworth Home Company and private persons, for the sum of $86,000 as rental therefor, payable in 60 equal installments of $1,435 each, with an option on the part of the Government to purchase said property at any time during said term of five years. There was a stipulation that on failure of the Government to exercise the option, all buildings or improvements placed on said land by the Government should become the property of the owners of the land.

Neither of the above proposals contained any restriction upon the use of said hotel in the reception for treatment of tubercular patients or those suffering from contagious or obnoxious diseases, as was done by the agreement of January 21, 1918.

Pursuant to section 2 of the act of March 3, 1919, 40 Stat. 1302, the War Department on November 8, 1919, transferred to the Public Health Service, Treasury Department, among other parcels of land, the Kenilworth Inn and hotel site.

On November 19, 1919, the two proposals of plaintiff dated November 1, 1919, were accepted, and a lease agreement dated November 19, 1919, demising the lots and parcels of land described in said proposals, embracing the Kenilworth Inn and site, was entered into between the Treasury Department and plaintiff for a term of five years, from November 8, 1919, to November 8, 1924.

For the lots and buildings described in proposal (a) the Government agreed to pay to plaintiff as rental for the term of five years [fol. 30] the sum of $86,000, and for the Kenilworth Hotel and site and the other lots and buildings described in proposal (b) the Government agreed to pay to the plaintiff as rental for the term of five years, the sum of $444,000, each of said sums to be paid in

equal installments. The contract also gave the Government the ion of purchasing at any time, within said term of five years, the operty described in proposal (a) for $287,000 and the property scribed in proposal (b) for $888,000.

The Government agreed at the end of said lease to give up said emises in the same condition as when it took possession, ordinary ar and tear, fire, elements, and acts of the public enemy excepted. e said contract contained no provision restricting the use of said tel by the Government in the reception for treatment of tubercular tients, or patients suffering from contagious or obnoxious diseases. The hotel after November 8, 1919, was designated hospital No. 45 the Public Health Service.

On July 26, 1920, the plaintiff and the Treasury Department tered into a contract supplemental to the contract of November , 1919, for the erection of two cottages in 50 and 65 days, respecely, for rental by the Government until November 8, 1924, at 00 per month each, with an option to purchase the same during period of occupancy hereunder at $10,000 each.

The proposals (2) dated November 1, 1919, and the supplemental reement of July 26, 1920, are attached to these findings as Apndix B and are made part of this finding by reference thereto. ne material part of the agreement of November 19, 1919, is atched to plaintiff's petition as Exhibit B, and is made a part of this ding by reference thereto.

V

During the period from February 1, 1918, to November 8, 1919, nen the contract with the War Department was in force, the Disease index, medical cards," Form No. 52, Medical Department, classified by the hospital authorities of the United States Army neral hospital No. 12, Biltmore, N. C., shows the admission of 119 tients on whose cards the word "tuberculosis" is mentioned. None these patients was received in said hospital for treatment of tuberlosis. Sixty were discovered after observation and diagnosis to free from tuberculosis, the others being received for operations, e treatment of concurrent diseases or both, or for observation. ose discovered to be suffering from tuberculosis were transferred a tubercular hospital as soon as practicable. It was not the purse or practice of the authorities of the Medical Corps having d hospital in charge to house tubercular patients therein otherwise an temporarily.

After the Public Health Service took charge of said hotel as hospi- No. 45, on November 8, 1919, patients suffering from pulmonary berculosis were housed and treated therein.

VI

The disease index medical cards of the United States general hostal No. 12, Biltmore, N. C., mention 55 cases of syphilis or gon- [vol. 31] orrhea treated during the period the hotel was under the

control of the War Department, from February 1, 1918, to November 8, 1919. Of these, 19 cases were discovered on diagnosis to have no venereal disease, 15 required an operation or the treatment of a concomitant disease requiring admission to the hospital, 3 were admitted for other than venereal diseases and the venereal disease developed after some time in the hospital. Of the whole number only 17 showed venereal conditions not requiring operations and not accompanied by other diseases. Of this 17, 7 were members of the organization at hospital No. 12, officers or enlisted men, 3 were members of a labor organization working in a nearby forest who walked from there to the hospital, 4 were taken sick near the hospital and presented themselves for admission, and 3 were transferred to hospital No. 12 without authority under the regulations. A venereal ward was maintained in the hospital during the period it was under the control of the War Department. A large proportion of those in the venereal ward were negroes. The patients affected with venereal diseases were coming to and going from the hospital all the time.

Syphilis is a contagious disease, and in the secondary and tertiary stage where open lesions or sores appear on face or body, it is obnoxious. Its contagion is practically limited to sexual contact. It may be communicated otherwise if abrasions of the skin should come in contact in any way with matter from an open sore or lesion on a person affected with syphilis, but the probability of this is decreased by the fact that the organisms of syphilis, if taken from the body and allowed to dry, die within twenty-four hours, and, unlike tuberculosis, leave no traces on the floor or walls of the room.

VII

In the latter part of the summer of 1918 one hundred and ninety interned Germans, principally sailors from merchant marine vessels caught in American ports when the war with Germany was declared suffering with typhoid fever in an acute stage, were transferred from Hot Springs, North Carolina, to hospital No. 12, four of whom died en route and seven died at different times after their arrival. These prisoners were sent to the hospital and kept there under the direct supervision of the Surgeon General's office. Special officers were placed in charge of them and a most elaborate study of typhoid fever was made in connection with the treatment of these patients, and special records were kept, and a special report made that constitutes one of the volumes of the medical and surgical history of the war.

Typhoid fever is a communicable disease. It is not contagious in the ordinary acceptation of the word. It is usually contracted by drinking water which has become contaminated by the organisms of typhoid from discharges from the intestines, through the feces or through the urine, finding their way into the water supply. It is also contracted by eating food prepared or handled by a person who has typhoid fever or is recovering from it, or who is what is termed a carrier of the disease. The organisms of typhoid die very quickly and, like the organisms of syphilis, leave no traces on the

floor or walls of the room. When a typhoid patient leaves a room and it is exposed to dry air and sunlight all danger of contracting the disease from that room disappears.

[fol. 32] VIII

Smallpox is regarded by the medical profession as the most contagious of diseases, with the exception of measles. It is also an obnoxious disease, and during the pustular stage is a revolting sight, disagreeable to the eye, to the sense of smell, and most objectionable in every way. Typhoid and syphilis are both communicable diseases, but are not contagious like smallpox, which may be contracted by coming within a few feet of persons suffering from it. The average case of typhoid is not obnoxious. Syphilis, except in the advanced stages where sores appear on the face and body, is not an obnoxious disease.

IX

The occupancy of the Kenilworth Inn by the Government as a general hospital, excluding therefrom patients with tuberculosis and other contagious or obnoxious diseases, would have reduced the rental value of the property as a hotel after its surrender by $50,000 per annum. What further reduction, if any, in rental value was caused by the housing and treatment of patients suffering from tuberculosis, typhoid, or venereal diseases does not satisfactorily appear from the evidence.

X

During the period the Kenilworth Inn was leased to the Public Health Service, the plaintiff received $70,000 per annum from the Government for the hotel property and paid out $80,000 per annum for insurance, taxes, payments on bonds, and upkeep.

XI

During the period the Kenilworth Inn was held as hospital No. 12 by the War Department under the contract of January 21, 1918, repeated protests were made by plaintiff to the proper officials of the War Department against the housing and treatment of tubercular and syphilitic patients.

XII

On August 2, 1921, the plaintiff presented a petition to the Secretary of War (1) for damages to its hotel property by the Government during the period it was under the control of the War Department from February 1, 1918, to November 8, 1919, in the sum of $158,721.32; (2) damages for breach of its contract of January 21, 1918, by receiving, housing permanently, and treating in its hotel building soldiers afflicted with tuberculosis and other contagious and obnoxious diseases, in the sum of $500,000.

The claim was investigated and considered by the War Department Claims Board, appraisal section, which on October 26, 1921, made an award to the plaintiff on item 1 as full, final, and complete

satisfaction of all present and future claims for damages to said hotel property growing out of its use by the War Department in the sum of $70,359.54.

[fol. 33] Plaintiff's claim (item 2) for breach of contract alleged to have been caused by receiving, housing, and treating cases of tuberculosis, typhoid, and syphilis was denied without prejudice to its right to pursue its claim in the proper forum.

The plaintiff, on October 27, 1921, received the award of $70,359.54 as payment in full for all damages to its hotel building, but specifically excepted from the receipt its claim for breach of contract.

The total amount found to be due was $81,066.28, but the Public Health Service agreed to pay $10,707.28.

The amount of $70,359.54 was paid by Treasury warrant dated November 1, 1921. When or how, if at all, the $10,707.28 was paid by the Public Health Service does not appear from the evidence.

XIII

On November 10, 1922, supplemental articles of agreement were entered into between plaintiff and the Government, through the Director of the United States Veterans' Bureau, by which it was stipulated that the plaintiff, in consideration of its agreement that the contracts of November 19, 1919 and July 26, 1920, for the term of the leases of the Public Health Service, instead of running up to June 30, 1923, should terminate on December 31, 1922, should be paid the sum of $72,128.70 in two equal monthly installments in arrears as rental under said contracts from November 1, 1919, to December 31, 1922. Of this amount the plaintiff received $27,188.88 as rental for the two months from November 1, 1919, to December 31, 1922, for the hotel property, and the balance as two months' rent for other property included in said leases, and for repairs to the hotel and such other properties.

XIV

After an expenditure for furniture and equipment of $161,875.21 the Kenilworth Inn was opened on March 10, 1923, for the reception of guests. During March the average number of regular guests was 30, April, 35, and May, 22, and for June up to the 20th the number was 18. From March 10 to March 16, 1923, the hotel entertained the national insurance convention with a daily average of 90, the highest number any day being 194. The North Carolina Medical Society was entertained at the hotel from April 12 to 17, 1923, the average count per day was 92 and the highest number registered any day was 180. The full guest capacity of the hotel was 450. The spring trade at Asheville is the highest grade, the rates shown by the hotel records were from $9 to $15 per day, depending on the number of rooms per person. There may be a crowded house run from July to September and 90 per cent in September, 75 per cent in October, and 66 per cent to January; during the latter month 50 per cent. In February trade begins to pick up, and in March, April, and the first 10 days in May there should be a good house. Dur-

ing the summer months of June, July, August, and September the rates are 10 per cent less than for the other months of the year. The room used for a venereal ward during Government occupation was used by the hotel management after it was opened as a hotel for a ladies parlor.

The business of the Battery Park Hotel, an old hotel in Asheville, during March and April, 1923, fell off $3,500 and in May a great [fol. 34] deal more than that, owing to the noise of excavation near it for the erection of a new hotel. About the 20th of April, 1923, all Asheville hotel business dropped off more quickly than usual. The period from March 10, 1923 to June 1, 1923 was taken by plaintiff to indicate the amount of business done by the Kenilworth Inn because the witnesses testifying in relation thereto were examined on June 21, 1923. During that period, two and two-thirds months, if the rent should be fixed at the rate paid by the Public Health Service for two and two-thirds months, $15,555.55 and miscellaneous expenses of $4,301.02, advertising $8,236.83 and advances made to guests, $7,566.07, none of which is satisfactorily established as legitimate expenses of operation for that period, should be eliminated from the expenses charged, the net loss in operating the hotel for that period would amount to $9,714.72.

Conclusion of Law

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the petition herein should be, and the same is, dismissed.

Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record in this cause, the amount thereof to be entered by the clerk and collected by him according to law.

Appendix A

Washington, D. C., December 11, 1917.

War Department, Washington, D. C.

Dear Sir: The Kenilworth Company, a North Carolina corporation, hereby proposes to enter into a contract of lease with the Government of the United States, whereby this company will lease to, and the Government agrees to take, for and during the term or time of duration of the present existing war with Germany, and for one year thereafter a treaty of peace shall be entered into between the United States and Germany, the property known and described as Kenilworth Inn, and the grounds thereof, in the town of Kenilworth, near the city of Asheville, in the State of North Carolina, including approximately four acres of bottom land on the Swannoa River and west of Kenilworth Road, upon the following terms and conditions:

(1) This company shall complete the erection of Kenilworth Inn, in accordance with the plans which are herewith submitted, except that no partitions or dividing walls indicated in red on said plans shall be installed, it being understood that all heating equipment and lighting fixtures are to be installed in the building, but this company shall not provide any furniture or operating equipment.

(2) The building and property are to be leased to the Government for the purpose of a convalescent hospital for disabled officers or soldiers, but it is especially understood, and the lease shall so provide, that no part of the property shall be used for the purpose of treating or housing any person suffering from tuberculosis in any form, or from smallpox or any other like contagious or obnoxious [fol. 35] disease, provided, however, that this shall not apply to a person suffering from tuberculosis, housed temporarily in said premises for an operation or the like.

(3) It is understood and agreed, and the lease shall provide, that the Government shall maintain all buildings, equipment and machinery in good condition and repair, and at the termination of the lease deliver the same up to this company in as good condition and repair as when leased, usual wear and tear and acts of God to be excepted.

(4) The Government shall pay to this company, as rental for said property, the sum of one hundred twenty-five thousand ($125,000) dollars for the first year of the term of the lease, and seventy-five thousand ($75,000) dollars, for each and every additional year of the term; the rent to be paid semiannually in advance, the first six months' rent to be paid upon the execution of the lease.

(5) The term of the lease proposed to be executed shall commence upon the completion of the building in accordance with the terms hereof, or upon the Government's taking possession of the premises, if it should desire to do so before the full completion of the building.

On account of the necessity in the change of the plans of construction, this proposal is required to be made for immediate acceptance.

Respectfully submitted.

The Kenilworth Company, by —— ——, President.

Headquarters Southeastern Department, Office of Quartermaster

Charleston, S. C., January 12, 1918.

From: Department Quartermaster.
To: Kenilworth Company, Kenilworth, Asheville, N. C.
Subject: Kenilworth Inn, Kenilworth, Asheville, N. C.

1. This office is in receipt of your offer of December 11, 1917, to lease Kenilworth Inn and the grounds thereof to the Government; also the authority to enter into a lease with you for this property.

2. Before entering into the lease it is necessary that your offer be restated, as certain of the terms contained therein are in conflict

with certain laws and regulations governing the entering into leases by the Government; one regulation is that no lease can extend beyond the close of any fiscal year; that is all Government leases terminate on June 30, that date being the end of the fiscal year. Hence, the lease made now can not extend beyond June 30, 1918; however, there is a provision in the lease giving the Government the right of renewal for an indefinite time, which in this instance will be one year after a treaty of peace is signed between the United States and Germany. A lease entered into at the termination of the lease beginning February 1, 1918, and ending June 30, 1918, would be for a year, and would terminate on June 30, 1918.

3. Section 3648, Revised Statutes, prohibits the Government from making payments in advance for any services or the delivery of articles of any description; accordingly, you could not be paid the rent in advance. Therefore, you are asked to redraft paragraph [fol. 36] 4 of your offer. However, it is understood from a letter from the Surgeon General of the Army that the rental for the first year shall be $115,000. For your information the lease can be so made as to provide for monthly payments of the rent on the 1st of the month for the calendar month just passed. In view of this statement, and also that the lease entered into now can not extend beyond June 30, 1918, you are asked to restate the terms of your offer contained in the introductory and fourth paragraph.

4. You are further asked to furnish this office with six blue prints or sketches of the property showing the boundary lines of the whole tract, giving the courses and distances, naming the owner or owners; giving any buildings, landmarks, water courses, roads, or other permanent improvements; State, county, etc., and the name of the engineer, scale, and date.

5. In addition, you are asked to give the name of the corporation and in what county it is located, and under the laws of what State it is incorporated; also the names of the president and secretary and six certificates of the resolution giving these officers—mentioning their names—the authority to sign for the corporation.

6. A prompt reply to this communication giving the information desired, and the blue prints and certificates requested, will enable this office to make an early completion of the lease.

By direction:

R. C. Gresham, 2d Lieut. Q. M. Corps, N. A., Asst. to Quartermaster.

Asheville, N. C., January 15, 1918.

Surgeon General, United States Army, Washington, D. C.

SIR: In accordance with the directions of the quartermaster of the Southeastern Department, we are restating our proposal to you of December 11, 1917, covering the leasing of the Kenilworth Inn and grounds to the Government, changing and amending it to conform with the regulations pointed out by the quartermaster's office:

The Kenilworth Company, a North Carolina corporation, hereby proposes to enter into a contract of lease with the Government of the United States, whereby this company will lease to and the Government agrees to take, for the term of time from February 1, 1918, to June 30, 1918, the property known and described as Kenilworth Inn, and grounds thereof, in the town of Kenilworth, near the city of Asheville, in the State of North Carolina, including approximately four acres of bottom land on the Swannanoa River, and west of Kenilworth Road, upon the following terms and conditions:

(1) This company shall at once complete the erection of Kenilworth Inn, in accordance with the plans and specifications which were heretofore submitted to you, except that no partitions or dividing walls indicated in red on said plans shall be installed; it being understood that all heating equipment and lighting fixtures are to be installed in the building, but this company shall not provide any furniture or operating equipment.

(2) The building and property are to be leased to the Government for the purpose of a convalescent hospital for disabled officers or [fol. 37] soldiers, but it is especially understood, and the lease shall so provide, that no part of the property shall be used for the purpose of treating or housing any person suffering from tuberculosis in any form, or from smallpox, or any other like contagious or obnoxious disease, provided, however, that this shall not apply to a person suffering from tuberculosis, housed temporarily in said premises for an operation or the like.

(3) It is understood and agreed, and the lease shall provide that the Government shall maintain all buildings, equipment, and machinery in good condition and repair, and at the termination of the lease deliver the same up to this company in as good condition and repair as when leased, usual wear and tear, and acts of God to be excepted.

(4) The Government shall pay to this company, as rental for said property, the sum of one hundred and fifteen thousand ($115,000) dollars for the first year of the term of the lease, and seventy-five thousand ($75,000) dollars, for each and every additional year of the term; the rent to be paid monthly on the first day of each and every month during the term of the lease, covering the rent for the calendar month just passed.

(5) The term of the lease proposed to be executed shall commence on the 1st day of February, 1918, and end on the 30th day of June, 1918; but the Government shall have the right and privilege under the contract of renewing the lease from year to year, for and during the continuation of the present war with Germany, and for one year after a treaty of peace has been signed between the United States and the German Government. It is desired, but not insisted upon by this company, that the contract of lease contain a clause, while not binding the Government in specific terms, to continue the lease in force for the duration of the war and one year;

but at the same time stating that this is the spirit or understanding between the contracting parties.

Respectfully submitted, The Kenilworth Company, by ——
——, President.

Headquarters Southeastern Department, Office of Quartermaster

Charleston, S. C., January 17, 1918.

From: Department Quartermaster.
To: Kenilworth Company, Kenilworth, Asheville, N. C.
Subject: Kenilworth Inn, Kenilworth, Asheville, N. C.

1. In reply to your letter 15th inst., and the offer therein to lease Kenilworth Inn and the grounds thereof to the Government for hospital purposes, this office requests you to restate paragraph 4 of the offer. This request is made in view of the fact that the lease entered into February 1, 1918, will expire June 30, 1918; and any statement covering amount to be paid for rental for "first year of the term of the lease" or "the first 12 months of the term of the said lease" would not be correct, for while the lease will contain a provision giving the right of renewal to one year after a treaty of peace is signed between the United States and Germany, and yet the lease [fol. 38] by law, will end on June 30, 1918, and a new lease will have to be entered into at that time to cover the period from July 1, 1918, to June 30, 1919, provided the Government desires to renew the lease.

2. Further, it is desired to change paragraph 2 of your offer so that it shall read, "the building and property are to be leased to the Government for the purpose of a convalescent hospital for disabled officers or soldiers, but it is especially understood, and the lease shall so provide, that no part of the property shall be used for the purpose of receiving for treatment any person suffering from tuberculosis in any form, or from smallpox, or any other like contagious or obnoxious disease, provided, however, that this shall not apply to a person suffering from tuberculosis, housed temporarily in said premises, for the purpose of an operation or the like."

3. This office will appreciate your prompt reply in order that there may be no delay in executing the lease.

By direction:

R. C. Gresham, 2d Lieut., Q. M. Corps, N. A., Asst. to Quartermaster.

(Recorded.)

Asheville, N. C., January 19, 1918.

From: The Kenilworth Company, Asheville, N. C.
To: Quartermaster, Southeastern Department.
Subject: Kenilworth Inn, Kenilworth, Asheville, N. C.

1. In obedience to your request contained in your letter of the 17th, instant, we beg to restate paragraph 2 of our proposal to the

Surgeon General for the leasing of Kenilworth Inn, making the same to read as follows:

"2. The building and property are to be leased to the Government for the purpose of a convalescent hospital for disabled officers and soldiers, but it is especially understood, and the lease shall so provide, that no part of the property shall be used for the purpose of receiving for treatment any person suffering from tuberculosis in any form, or from smallpox, or any other like contagious or obnoxious disease, provided, however, that this shall not apply to a person suffering from tuberculosis, housed temporarily in said premises, for the purpose of an operation or the like.

We also restate paragraph 4 of the proposal, making the same to read as follows.

"4. The Government shall pay to this company for the use of said property a monthly rental of $9,583.33 for each month of the term thereof, and should the Government desire to renew said lease, it shall pay a monthly rental of $9,583.33 for the first seven months of said renewal term and a monthly rental of $6,250 for each month thereafter of said renewed term, the rent to be paid monthly on the first day of each month covering the rent for the calendar month just passed."

It is hoped that this will meet with your approval and that the lease can be executed without delay.

Very truly yours, The Kenilworth Company, by ——— ———, President.

[fol. 39] APPENDIX B

Asheville, N. C., November 1, 1919.

To the Secretary of the Treasury, Washington, D. C.

SIR: The Kenilworth Company hereby proposes to lease to the United States of America, for the term of five years beginning the 8th day of November, 1919, and expiring on the 8th day of November, 1924, at the rental or charge, and upon the terms and conditions hereinafter set forth, all those certain lots, blocks, and parcels of land, together with the existing buildings and improvements thereon, situate, lying and being in the town of Kenilworth, in the county of Buncombe and State of North Carolina, and being more particularly bounded and described as follows, to wit:

That certain tract or parcel of land containing 10.5 acres, known as the hotel site tract, lying to the east and south of the extension of Caledonia Road, upon which the Kenilworth Inn is situated, and being fully described in the deed of the Kenilworth Development Company to the Kenilworth Company, which said deed and contract are duly recorded in the office of the register of deeds for Buncombe County, reference thereto being hereby made; as well

Also the following lots with residences, buildings and other improvements thereon; that is to say, lots Nos. 9, 11, 14, and 24 of block E of the plat of the property of the Kenilworth Development Com-

pany, which is duly recorded in the office of the register of deeds for Buncombe County, and to which reference is hereby made:

Lots Nos. 1, 6, and 16 of block F of said plat;

Lots Nos. 1, 2, and 3 of block K of said plan and

Lots Nos. 75, 76, 77, 78 ,79, 95, 96 and 97 of the hotel block of said plat.

Excepting and reserving from this proposal a small triangle in the northeast corner of said lot No. 11, described as follows: Beginning at a stake in the southern margin of Chiles Avenue at the northeast of corner of said lot and runs thence with the eastern line of said lot S. 3 degrees 43 minutes E. 100 feet to a stake in the same; thence N. 18 degrees 08 minutes W. 100 feet to a stake in the southern margin of Chiles Avenue; thence with said margin of Chiles Avenue N. 72 degrees 15 minutes E. to the beginning.

Terms and Conditions

(1) The United States of America shall pay to the said The Kenilworth Company as rental for said property during said term of five years the sum of four hundred and forty-four thousand ($444,000) dollars, payable in sixty (60) equal monthly installments of seven thousand four hundred ($7,400) dollars each.

(2) It is expressly stipulated, understood, and agreed that the United States of America is to take possession of said lands and buildings thereon in their present condition and state of repair without obligation on the part of the undersigned to alter, improve, or repair the same, and that the United States of America shall, during the term hereinbefore specified, maintain said buildings and all [fol. 40] machinery, equipment, fixtures and appliances incident thereto, or connected therewith, in good condition and repair, usual wear and tear and acts of God excepted, and that in all cases where any of said machinery, equipment and appliances shall, during said term, be destroyed or rendered unserviceable by use or abuse, that the same shall be replaced by the United States of America.

(3) It is expressly stipulated and agreed that should, during the term hereinbefore specified, any of the buildings on said lands be destroyed by fire, that there shall be no obligation on the part of the Kenilworth Company to rebuild or replace the same; provided, however, that the rental hereinbefore specified shall be reduced annually by a sum equal to 10 per cent of the value of the building and other improvements so destroyed, and the option price hereinafter specified shall be reduced an amount equal to the value of the building or improvements so destroyed.

(4) The United States of America shall have the right and option to purchase said property at any time during the said term of five years at the price of eight hundred and eighty-eight ($888) dollars, which, after a careful and exhaustive investigation and examination by the agents of the Treasury Department has been fixed and ascertained as the reasonable and fair market value of said prop-

erty; provided, however, and it is expressly stipulated and understood that should the United States of America exercise its option to purchase said property it shall and will, at the same time, exercise its option to purchase certain lands fully described and included in a certain proposal bearing even date herewith and made by the undersigned, the Kenilworth Company, to the Secretary of the Treasury, it being expressly stipulated and agreed that the United States of America shall not acquire, or attempt to acquire, any part or parcel of said lands or premises less than the whole included within the two said proposals, or at a price less than that stipulated in said proposals as the reasonable and fair market value of said property.

(5) It is stipulated and understood that should the United States of America exercise its option to purchase said lands and buildings thereon hereinbefore particularly described, as hereinbefore provided, the Kenilworth Company shall credit and remit to the United States of America an amount equal to thirty-three and one-third per cent of the total rent paid for said property, mentioned and described in this proposal, up to the date of the payment of the purchase price therefor, thereby reducing the purchase price by an amount equal to thirty-three and one-third per cent of the amount of the rent so paid.

(6) That should the United States of America exercise its option to purchase said lands as hereinbefore provided, the rental hereinbefore reserved and agreed to be paid shall cease from and after the date of the actual payment of the purchase price of said lands.

(7) It is stipulated and understood that should the United States of America fail to exercise its option to purchase said lands as hereinbefore provided, then and in that event all buildings and additions, or other improvements which may be placed upon said lands, or any part thereof, by the United States of America during the term of said lease shall be and become the property of the owner or owners of said lands.

[fol. 41] (8) Should the United States of America exercise its option to purchase said land as hereinbefore provided, the Kenilworth Company agrees to furnish to the United States attorney for the western district of North Carolina, promptly upon receipt of notice and without additional expense to the United States of America, an accurate survey of the property hereinbefore described and included within the terms of this proposal, prepared in accordance with the specifications therefor of the Treasury Department, as well, also, all requisite abstracts, official certifications, and evidences of title necessary in the opinion of [balance of paragraph missing from record].

(9) This proposal, if and when accepted by the Secretary of the Treasury, or an Assistant Secretary of the Treasury duly authorized to act in the premises, shall constitute a complete and binding contract between the Kenilworth Company and the United States of America.

The Kenilworth Company, by S. A. Lynch, President.

Attest: C. E. Holcumbe, Secretary. (Corporate Seal.)

Asheville, N. C., November 1, 1919.

To the Secretary of the Treasury, Washington, D. C.

SIR: The Kenilworth Company hereby proposes to lease to the United States of America, for the term of five years beginning on the 8th day of November, 1919, and expiring on the 8th day of November, 1924, at the rental or charge, and upon the terms and conditions hereinafter set forth, all those certain lots, blocks, and parcels of land, situate, lying and being in the town of Kenilworth, in the county of Buncombe and State of North Carolina, and being more particularly bounded and described as follows, to wit:

Beginning at a stake in the southern margin of Caledonia Road, at the extreme northern corner of the Myers property, and running thence with the eastern and southern margin of Caledonia Road in a northerly and easterly direction to the northwest corner of lot No. 10 of block K, of the Kenilworth plat; thence crossing Caledonia Road to the northwest corner of lot No. 12 of block F, the same being in the southern margin of Forest Road; thence with the southern margin of Forest Road S. 82 degrees 18 minutes E. 70.5 feet to a stake at the northwest corner of lot No. 11 of said block F; thence with the western line of lot No. 11 S. 3 degrees 07 minutes W. 116.4 feet to a stake in the northern line of lot No. 13 of said block F; thence with the northern line of said lot No. 13, S. 88 degrees 16 minutes E. 70 feet to a stake at the southwest corner of lot No. 10 of said block; thence with the western line of said lot No. 10 N. 3 degrees 01 minute E. 109.6 feet to a stake in the southern margin of Forest Road at the northwest corner of said lot No. 10; thence with the southern margin of Forest Road N. 88 degrees 52 minutes E. 198.45 feet to the intersection of the southern margin of Forest Road with the western margin of Kenilworth Road; thence [fol. 42] with the western margin of Kenilworth Road S. 18 degrees 08 minutes E. to a stake in said margin of Kenilworth Road standing S. 71 degrees 52 minutes W. 50 feet from the southwest corner of lot No. 14 of block E of the Kenilworth plat; thence crossing Kenilworth Road and running with the southern line of said lot No. 14 N. 71 degrees 52 minutes E. 250 feet to a stake at the southeast corner of said lot No. 14; thence with the eastern line of lots Nos. 15 and 16 of said block E., S. 18 degrees 08 minutes E. 180 feet to a stake at the southeast corner of said lot No. 16; thence with the southern line of said lot No. 16 S. 71 degrees 52 minutes W. 25 feet to a stake at the northwest corner of lot No. 17 of said block E; thence with the eastern lines of lots 17 to 23, inclusive, of block E., S. 18 degrees 08 minutes E. 560 feet to a stake at the northeast corner of lot No. 24 of said block E; thence with the northern line of said lot No. 24 of said block E., S. 72 degrees 52 minutes W. 178 feet to a stake in the eastern margin of Kenilworth Road; thence with the eastern margin of Kenilworth Road S. 33 degrees 20 minutes E. 82.9 feet to a stake at the northwest corner of lot No. 25 of said block E; thence with the northern line of said lot No. 25 N. 71 degrees 52

minutes E. 181.3 feet to a stake; thence south 18 degrees 08 minutes E. with the line of the Reed property 223 feet to a stake at the northeast corner of the Matthews lot; thence with the northern line of the Matthews lot S. 66 degrees 22 minutes W. 100 feet to a stake; thence with the western line of the Matthews lot S. 18 degrees 08 minutes E., crossing the Swannanoa Drive and the Swannanoa River to a stake on the south bank of said river; thence down and with the south bank of said river as the same meanders to a stake standing south 10 degrees 26 minutes E. 110 feet, more or less, from the southeast corner of what is known as the Odd Fellows lodge lot; thence N. 10 degrees 26 minutes W., crossing the Swannanoa River and the Swannanoa Drive, and with the eastern line of said Odd Fellows lodge lot 210 feet, more or less, to the northeast corner of said Odd Fellows lodge lot; thence with the northern line of said Odd Fellows lodge lot S. 62 degrees 52 minutes W. 50 feet to a stake at the northwest corner of said lot and in the east line of the property of the Vanderbilt estate; thence with the eastern line of the property of the Vanderbilt estate, Paquin and Myers, the following courses and distances: N. 9 degrees 35 minutes W. 1,064.4 feet to a stake, and N. 32 degrees 33 minutes W. 492 feet, more or less, to the beginning.

Reserving and excepting, however, from the terms and operation of this proposal that certain tract of land containing approximately 10.5 acres, known as the hotel site lying to the south and east of the extension of Caledonia Road, and fully described by metes and bounds in the deed of the Kenilworth Development Company to the Kenilworth Company, and the contract to convey from the Kenilworth Development Company to the Kenilworth Company, upon which is located Kenilworth Inn, said deed and contract being recorded in the office of the register of deeds for Buncombe County, North Carolina, and to which reference is hereby had; as well

Also the following lots upon which buildings or residences have been constructed; that is to say, Lots Nos. 8 and 9 of block P (the property of J. H. Caine and wife); lots 75, 76, 77, 78, 79, 95, 96, and [fol. 43] 97 of the hotel block (the property of the Kenilworth Home Company and E. C. Hester); lot No. 1 of block F (the property of Edward Holland); lots Nos. 2 and 3 of block K (the property of Mrs. Ryan); lots 6 and 16 block F (the property of Mrs. Elizabeth Smith), and lot No. 1 of block K (the property of J. M. Caldwell; as well

Also such public roads or streets as may be within the general boundaries hereinbefore described, it being only the intention of the owners of the property included within this proposal to include only such rights as it may have therein.

Terms and Conditions

(1) The United States of America shall pay to the said The Kenilworth Company as rental for said property during said term of five years the sum of eighty-six thousand one hundred ($86,100) dollars, payable in sixty (60) equal monthly installments of $1,435 each.

(2) The United States of America shall have the right and option to purchase said property at any time during the said term of five years at the price of two hundred and eighty-seven thousand ($287,000), dollars, which, after a careful and exhaustive investigation and examination by the agents of the Treasury Department, has been fixed and ascertained as the reasonable and fair market value of said property; provided, however, and it is expressly stipulated and understood that should the United States of America exercise its option to purchase said property that it shall and will, at the same time, exercise its option to purchase certain lands, with buildings thereon, fully described and included in a certain proposal bearing even date herewith and made by the undersigned, the Kenilworth Company, to the Secretary of the Treasury, it being expressly stipulated and agreed that the United States of America shall not acquire, or attempt to acquire, any part or parcel of said lands or premises less than the whole included within the two said proposals, or at a price less than that stipulated in said proposals as the reasonable and fair market value of said property.

(3) Should the United States of America exercise its option to purchase said lands as hereinbefore provided, the rental hereinbefore reserved and agreed to be paid shall cease from and after the date of the actual payment of the purchase price for said lands.

(4) It is stipulated and understood that should the United States of America fail to exercise its option to purchase said land as hereinbefore provided, then and in that event all buildings or other improvements which may be placed upon said land, or any part thereof, by the United States of America during the term of said lease shall be and become the property of the owner or owners of said land.

(5) Should the United States of America exercise its option to purchase said land as hereinbefore provided, The Kenilworth Company agrees to furnish to the United States attorney for the western district of North Carolina, promptly upon receipt of notice and without additional expense to the United States of America, an accurate survey of the property hereinbefore described and included within the terms of this proposal, prepared in accordance with the [illegible] 44] specifications therefor of the Treasury Department, as well, also, all requisite abstracts, official certifications and evidences of title necessary in the opinion of the Attorney General of the United States to vest in the Government a good and valid title to said property, free and clear of all encumbrances and liens whatsoever.

(6) This proposal, if and when accepted by the Secretary of the Treasury or an Assistant Secretary of the Treasury duly authorized to act in the premises, shall constitute a complete and binding contract between The Kenilworth Company and the United States of America.

The Kenilworth Company, by S. A. Lynch, President.

Attest: C. E. Holcombe, Secretary. (Seal The Kenilworth Company, Incorporated, Kenilworth, N. C.)

July 26, 1920.

The Kenilworth Company, Asheville, North Carolina.

GENTLEMEN: Pursuant to authority vested in the Secretary of the Treasury your proposal of July 6, 1920, to erect two cottages for Officers' quarters in connection with U. S. Public Health Service hospital, and all terms and conditions of the said agreement are the following terms and conditions:

1. That this acceptance is supplemental to the agreement entered into by you and the Treasury Department under date of November 19, 1919, leasing certain lands and improvements thereon for the use of the Public Health Service in the operation of the aforesaid hospital, and all terms and conditions of the said agreement are hereby made a part of this acceptance in so far as they may be applicable.

2. That the said cottages shall be erected on sites to be designated by the medical officer in charge of the aforesaid hospital, such sites to be on land included in proposal (a) of the agreement hereinbefore referred to in paragraph 1 hereof, and shall be constructed in accordance with with plans and specifications heretofore approved by the U. S. Public Health Service, copies of said plans and specifications being attached hereto and made a part hereof.

3. That one cottage shall be ready for delivery to and occupancy by the United States not later than fifty (50) days from the date of your assent to the terms and conditions of this acceptance, the other cottage to be ready for delivery to and occupancy by the United States not later than sixty-five (65) days from the date of such assent hereto. Time is of the essence of this acceptance and it is expressly understood and agreed that in the event the said cottages, or either of them, are not ready for delivery and occupancy at the time specified, the United States shall have the right to occupancy of said cottages, or either one thereof, without payment of rent, for a period in each instance equal to the period of delay, but you shall not be held responsible for any delay occasioned by strikes, accidents, or circumstances beyond your control, and no occupancy without payment of rent shall be claimed by the United States as a result thereof.

[fol. 45] 4. That the rent to be paid you by the United States shall be at the rate of one hundred dollars ($100) per month for each cottage, payable in arrears, rent hereunder in each instance to accrue beginning with the date of occupancy, except as provided for in paragraph 3 hereinabove.

5. That the term of occupancy hereunder for each cottage shall terminate on November 8, 1924, except that in the event of purchase by the United States the rental hereinbefore reserved and agreed to be paid shall cease from and after the date of the actual payment of the purchase price.

6. That the United States shall have the right or option to purchase either one or both of the said cottages at any time during the period of occupancy hereunder, the purchase price of each cottage being hereby expressly fixed at ten thousand dollars ($10,000), hereby expressly excepted from reduction under the "credit and remittance" clause contained in the option for purchase of items under proposal (b) of the agreement of November 19, 1919, hereinbefore referred to.

You are requested to retain the original of this communication and write upon the accompanying copy hereof, date and sign, your unqualified assent to the provisions hereof, and return such assent copy promptly to this department.

Respectfully, J. H. Moyle, Assistant Secretary.

Kenilworth, N. C., August 23, 1920.

We hereby unqualifiedly assent to the provisions in the above letter interpreting the acts of God to cover rainy days on which work is impossible; also that the price in the event of purchase is to be $10,000 for the house alone, the purchase of the lot being covered by the original contract with the Kenilworth Company.

Kenilworth Company, by J. M. Chiles, President.

OPINION

Booth, Judge, delivered the opinion of the court:

The Kenilworth Company is a North Carolina corporation, incorporated to build and operate a hotel. The company had in process of construction and near to completion a hotel building designed to accommodate 150 guests, which it had designated the Kenilworth Inn. The enterprise was an important one and involved the expenditure of $815,000. The building itself had so far progressed toward completion that on December 11, 1917, the company proposed to the defendant a lease of the entire building and grounds for a convalescent hospital for disabled officers or soldiers. It is not important, at present, to enter into details respecting various items of rental and other terms and conditions of the lease, which was finally executed on January 21, 1918, except the one and only cove-
[fol. 36] nant of the same which the plaintiff company now alleges the defendant not only failed to observe but positively breached.

The plaintiff company in its proposal set forth in paragraph two the following restriction upon the use of the building:

"(2) The building and property are to be leased to the Government for the purpose of a convalescent hospital for disabled officers or soldiers, but it is especially understood, and the lease shall so provide, that no part of the property shall be used for the purpose of treating or housing any person suffering from tuberculosis in any form, or from smallpox or any other like contagious or obnoxious disease, provided, however, that this shall not apply to a person suf-

fering from tuberculosis housed temporarily in said premises for an operation or the like."

The defendant refused to accept the restriction as proposed, and offered in its stead the following proposal:

"(2) The building and property are to be leased to the Government for the purpose of a convalescent hospital for disabled officers and soldiers, but it is especially understood, and the lease shall so provide, that no part of the property shall be used for the purpose of receiving for treatment any person suffering from tuberculosis in any form, or from smallpox, or any other like contagious disease, provided, however, that this shall not apply to a person suffering from tuberculosis housed temporarily in said premises for the purpose of an operation or the like."

The plaintiff accepted the modification of its proposal, and as thus worded by the defendant's officer the restriction as to use was inserted in the contract. The plaintiff company alleges and seeks to prove that in positive violation of the agreed restrictive use of its hotel building the defendant did receive and house for prolonged treatment in said building, and did keep and maintain therein for prolonged periods, a great number of persons suffering from tuberculosis, contagious, and like obnoxious diseases over the protest of the company, and during the entire time of its occupancy; that in addition to receiving for treatment officers and soldiers of the United States afflicted as aforesaid, a large number of interned German prisoners of war suffering from a malignant type of typhoid fever were received and treated at the hospital, many of whom died, resulting from the causes enumerated in a claimed damage to the reputation of the hotel whereby it has, for the time being at least, lost its attractive force as a public inn, and its use and income as such impaired to the extent of $865,000.

The argument advanced to sustain the above contention is predicated primarily upon the peculiar climatic conditions obtaining at Asheville, North Carolina, and vicinity. The city of Asheville itself possesses a most alluring aspect, dual in character, and because of its location and climate attracts thereto a large transient population seeking rest and recreation, and also a considerable number of patients seeking a cure for tuberculosis. Because of this situation and to avoid a conflict between the two elements, which would manifestly tend to injure the city's tourist population, most stringent local laws and regulations have been adopted by the municipality looking towards the complete isolation of tuberculosis patients from the remaining population, both permanent and transient. The repu- [fol. 47] tation of the town, generally known throughout the country, is such that the course thus pursued is indispensable to its maintenance, and any deviation therefrom is sufficient, especially if premises are let for tubercular patients, to practically destroy a building so demised for use for any other purpose, at least for a long term of years when such use may perhaps be forgotten.

The claim is likened to an injury to the reversion by a tenant in possession under a lease; not the commission of waste, etc., but

breach of contract, violation of an express contract. The measure of damages is concededly the extent of injury, not to the freehold itself, this having been satisfactorily adjusted, but to the contemplated use in the future, of the premises demised, it being alleged that it will require years to outlive the fact that patients of the kind proscribed in the lease were treated in the inn. Emphasis is put upon two cases decided by the Supreme Court of Massachusetts—Hersey v. Chapin, 162 Mass. 176, and Delano v. Smith, 206 Mass. 365. This case, in point of fact, is so directly opposed to the situation adjudicated in the cases cited that it is difficult to perceive their applicability. A tenant in possession of a dwelling house under a lease is assuredly obligated, as these cases hold, to refrain from subletting the premises for use as a smallpox hospital—a pesthouse—to the injury of the reversion. The distinction, a very important one, between the cases cited and the issue here is that the owner of the premises, the owner of the reversion, let the premises as an original proposition for use as a hospital. By its own lease the plaintiff contemplated the incidental injury to the reversion arising from mere use and occupation, if any such occurred, and is presumed to compensate itself therefor in the fixed rental. The issue here is a direct contractual relationship between the owner of the premises and the tenant, and an allegation of breach of the same. The mere fact that the plaintiff intended to use the building as a hotel is without significance. The owner was in nowise constrained to elect to rent it as a hospital instead. What the plaintiff did was to rent the building as a hospital, with a restrictive clause in the lease, and it is the violation of this clause, if any, for which recovery may be had. If the owner of a dwelling voluntarily demises the same as a hospital, may he recover damages because its use as a hospital prejudiced its future occupation as a dwelling? Manifestly not. The question we must meet is the ascertainment of a breach of the contract and the damages accruing from the breach.

The difficulty which confronts the court, granting arguendo the facts and the law as contended for, is the ascertainment of a basis for assessing damages. We may well surmise, and it is doubtless true, that the class of patrons the Kenilworth Inn was designed to entertain and accommodate would be positively deterred from going there if made acquainted with the use of the building during the war; nevertheless, it was in the beginning the voluntary act of the plaintiff company itself which changed the character of the inn, at least temporarily, from a hotel building to a Government hospital. The Government did not commandeer it, and so far as this record discloses, did not seek the lease. Need we augment this observation with the obvious fact that such a lease, irrespective of its restrictive terms and conditions, known alone to the parties thereto, was sufficient in Asheville to jeopardize the reputation of the inn as a [fol. 48] high-class tourist resort? The witnesses in the record testifying as to damages fix the amount upon the damages incident to a well known and distinct lease of premises for a tubercular hospital, without considering that the lease of a hotel for a Government hospital during the war or any other time, is ipso facto suf-

ficient to induce a prospective guest to seek accomodations in another hotel never so used. To what extent the receipt and treatment of a limited number of tubercular patients might increase the damages is not demonstrated. The hypothesis upon which the proof proceeds is the assertion of the fact that a hotel converted into a tubercular hospital is practically destroyed as a hotel for years thereafter, without considering the proposition that a conversion of the property by the voluntary act of the owners into a hospital of any character would necessarily encounter a reputation, at least to some extent, injurious to the same as a high-class inn, when it again comes into open competition with others not so used. So that it seems to us that the mere fact of housing tubercular patients and others with like obnoxious diseases, was not altogether the direct and proximate cause of the damages suffered, especially so when the express terms of the lease conceded their admission for a particular purpose.

Tubercular and all other patients, irrespective of their affliction, were to be received in surgical cases. While their continuance in the hospital may have been temporary, may we conclude that knowledge of their reception, even for this single purpose, was not sufficient in Asheville, where the situation in this respect is decidedly acute, to work a measure of injury to the reputation of the inn? In addition to this, the situation becomes more confused by the fact that the inn itself had never been opened to the public as a hotel, and had never been operated as such. No guests had registered and none invited until long after the expiration of this particular lease. Manifestly, without some evidence of the success of the enterprise, and some basis upon which to rest a judgment as to impairment of income, it would be no more than mere speculation to hold that the property in question would have been a profit-yielding venture. The defendant did not prevent the company from resuming the enterprise as a hotel proposition upon the expiration of the lease complained of. The plaintiff company, on the contrary, voluntarily entered into two additional leases, extending the use of the building as a hospital, and submitted to the elimination therefrom of the very restrictive clause of which it now complains, and thereafter tubercular patients were received therein and treated for the disease. Up until December 31, 1922 the inn was continuously used and occupied by the Government as a hospital. If, then, the plaintiff company, for a period of practically five years, demised its premises for use as a hospital, part of the time with a limited restrictive clause, and for much the greater portion of the time without any restriction, how may we estimate with any degree of certainty an alleged damage to its reputation or use as an inn, when, as a matter of fact, it had never attained any reputation or been used as such?

The company had no more than a pretentious building, inviting surroundings, and possibly a successful future. The value of its use as an inn was in the making. No clearer demonstration of this need be cited than the fact that the company itself granted an option of purchase for $888,000, a sum but little in excess of what

it now demands as damages. That there may be a recoverable in-[fol. 49] jury to the reversion by a tenant in possession under a written lease is, of course, not controverted, but the present difficulty has to do with the measure of damages, nothing else.

The plaintiff uses the building as an inn, guests have been received and entertained, and there is nothing in the record to show that any have departed or others failed to come because of the previous use of the building as a hospital. As a matter of fact the plaintiff opened the inn on March 10, 1923, some three months after resuming possession of the same, and between that date and the 16th of the same month entertained a daily average of 90 people, there being 194 guests at one time quartered in the inn. In the following month of April the North Carolina Medical Society was entertained at the inn, a notable incident, there being as high as 180 guests, probably doctors, registered in one day. While this was below the full capacity of the inn, it is of probative value in disclosing a lack of the existence of a discreditable force, sufficient in extent to publicly condemn the inn for use as such. Indeed, it is not in anywise a discouraging showing for the beginning of the enterprise.

Of still greater significance, however, is the apparently indisputable fact that the defendant did not violate the lease. When the plaintiff sought to induce the defendant to lease the inn the restrictive clause proposed would have precluded the use of the same for the treating or housing of tubercular patients except in surgical cases. This clause, "that no part of the property shall be used for the purpose of treating or housing any person suffering from tuberculosis in any form, or from smallpox or any other like contagious or obnoxious disease," was, indeed, highly restrictive. Under its terms the excepted patients were excluded. The defendant was unwilling to assent to the restriction. It was known—experience had so demonstrated—that a patient might possibly obtain admission to the hospital apparently free from the excepted diseases and subsequently develop one of the banned afflictions. In order to meet this emergency, and at the same time recognize as far as possible the desire of the plaintiff in this respect, the defendant changed this stipulation so as to read "that no part of the property shall be used for the purpose of receiving for treatment any person suffering," etc. The plaintiff, as before observed, agreed to the substitution. Therefore, the obligation arising out of this most significant clause extended no further than its express terms, not to receive for treatment patients falling without the restricted class. What do the words "receiving for treatment" mean? It is not asserted that they import absolute exclusion. Their ordinary and usual meaning indicate a clear intent to impose upon the defendant the positive obligation to refrain from knowingly receiving a patient within the restricted class and thereafter treating him for the disease. In other words, in so far as it was possible, by every known medical means, the defendant would not receive for treatment a patient known at the time to fall within the restriction.

Manifestly, though such a patient might be received temporarily he could not be immediately and ruthlessly cast aside, and if immediately thereafter he was *transferred* to a regular tubercular hospital for treatment, no promises were broken. As a matter of fact, that is precisely what happened. Of a total number of 119 [fol. 50] patients on whose cards the word "tuberculosis" is written, 60 were found after observation and diagnosis to be free from the disease, some were received for operations, some were treated for concurrent diseases, and others were under observation. Not one of the total number was received or treated as a tubercular patient, and when tuberculosis developed in each instance, as soon as it was practicable the patient was transferred to a tubercular hospital. The record unmistakably discloses that it was the purpose of the authorities in charge of the hospital to observe this restriction to its fullest extent.

A venereal ward was maintained in the hospital and patients were treated for venereal diseases. The facts appear in Finding VI. Typhoid patients were received and treated, and this is set forth in Finding VII. The restrictive clause is limited to the reception for treatment of any person suffering from tuberculosis, smallpox or any like contagious or obnoxious disease. The expert medical testimony in the record removes these diseases from the category of "like contagious and obnoxious disease." Under the well-known rule of ejusdem generis they are not to be classified as germinating that degree of contagion and obnoxion inherently attached to tuberculosis and smallpox. In its popular sense a venereal disease is odious, but the parties to this demise were not so considering it. The premises demised were to be used as a hospital, an institution of disease, a scientific refuge for its treatment, and the plaintiff was intent on excluding tubercular patients, smallpox patients, and others of like affliction. Surely it was not within the contemplation of the parties that all contagious diseases should fall within the restriction. If so, under modern diagnosis and authority patients suffering from bad colds might be excluded.

Applying to this clause the ordinary rules of construction, it seems obvious that the intent of the parties was to limit the restriction to patients whose disease would fall within the scope of contagion and objection attached to tuberculosis and smallpox. The weight of expert testimony in the record establishes this fact that the diseases complained of are not to be classified as such. The degree of danger from contagion is incomparable and the diseases themselves, while loathsome and repulsive, are not obnoxious in the technical sense, nor to the same extent as tuberculosis and smallpox, which may spread by innocent contact and endanger an entire locality and its population.

The case, then, in whatever aspect it may be considered seems devoid of merit. The petition will be dismissed, and it is so ordered.

Graham, Judge; Hay, Judge; Downey, Judge, and Campbell, Chief Justice, concur.

[fol. 51] VI. JUDGMENT—Jan. 21, 1924

At a Court of Claims held in the City of Washington on the Twenty-first day of January, A. D., 1924, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the defendant, and do order, adjudge and decree that the plaintiff, as aforesaid, is not entitled to recover and shall not recover any sum in this action of and from the United States; and that the petition herein be and the same hereby is dismissed: And it is further ordered and adjudged that the United States shall have and recover of and from the plaintiff, aforesaid, the sum of Thirty dollars and twenty-eight cents ($30.28) the cost of printing the record in this court, to be collected by the Clerk, as provided by law.

By the Court.

VII. HISTORY OF PROCEEDINGS AFTER JUDGMENT

On March 21, 1924, the plaintiff filed a motion to set aside judgment and to amend findings of fact.

On May 12, 1924, the Court filed an order overruling plaintiff's motion for a new trial.

On July 10, 1924, the plaintiff presented for filing, a motion for leave to file a second motion to amend findings of fact.

On July 12, 1924, the court entered the following order:

Order

The court having considered the motion presented for filing on July 10, 1924, on the part of the plaintiff asking leave to file a second motion to set aside the judgment or to amend the findings of fact announced January 21, 1924, it is now ordered that said motion be and the same is denied.

[fol. 52] VIII. PETITION FOR APPEAL—Filed Aug. 9, 1924

Claimant, showing to the court that on January 21, 1924 the Court rendered a judgment in this case, dismissing the petition; that under an extension allowed by the court claimant on April 28 following filed a motion for a new trial and amendment of the findings of fact, and that on May 12 following said motion was overruled by the court, and that the case involves more than three hundred thousand dollars ($300,000.00) *dollars*, hereby applies for an appeal to the United States Supreme Court from said judgment.

The Court is respectfully referred to a separate motion, in these premises, offered this day by claimant for filing.

Benj. Carter, Attorney for Claimant.

IX. Order Allowing Appeal

It is ordered by the Court this 13th day of October, 1924, that the plaintiff's application for appeal be and the same is allowed.

By the Court.

[fol. 53] In Court of Claims of the United States

[Title omitted]

Clerk's Certificate

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled case; of the argument and submission of case; of the findings of fact, conclusion of law and opinion of the court by Booth, J.; of the judgment of the court; of the proceedings after the entry of judgment; of the plaintiff's application for an appeal and of the order of the court allowing said application.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this Twelfth day of November, A. D., 1924.

F. C. Kleinschmidt, Assistant Clerk Court of Claims. (Seal of the Court of Claims.)

Endorsed on cover: File No. 30,791. Court of Claims. Term No. 240. The Kenilworth Company, appellant, vs. The United States. Filed January 5th, 1925. File No. 30,791.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

THE KENILWORTH COMPANY, *Appellant*,
v.
THE UNITED STATES, *Appellee*
} No. 240

Appeal from the Court of Claims

Motion of Appellant for Remand to Court of Claims for Amendment of Findings of Fact.

Brief for Appellant on Its Appeal and on Motion for Remand to Court of Claims.

BENJAMIN CARTER,
Attorney for Claimant.

JUNIUS G. ADAMS,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

THE KENILWORTH COMPANY, *Appellant*,
v.
THE UNITED STATES, *Appellee*
} No. 240

Appeal from the Court of Claims

MOTION OF APPELLANT FOR REMAND TO THE COURT OF CLAIMS FOR THE PURPOSE OF ADDITIONS TO THE FINDINGS OF FACT.

Appellant shows to the Court that in the several matters set out below the findings of the Court of Claims contained in the record of the case now before this court are radically defective: (1) in that important facts are omitted, and (2) in that some of the statement of fact stated are not supported by any evi-

dence. Said defects can be cured, and the case presented on its true merits, if findings of fact are made and reported by the Court of Claims to this Court on said points, to-wit:

1. The full correspondence, or other negotiations, between the office of the Surgeon General of the Army and appellant which resulted in the changes in the proposed contract of lease which, in part, are indicated in paragraph IV of the present findings (Record pp. 2-4).

2. Whether or not patients received in said hospital for examination as to tuberculosis were retained and treated there, upon ascertainment that this disease existed, and treated for the same, and what protest or other representations, if any, in regard to any such cases were made by the local officer in charge to the Surgeon General's office at Washington or to any other officers of that bureau in charge of hospitals.

3. What other representations, if any, were made by the local officer in charge or other responsible officers of said hospital to the Surgeon General's office, or other branch of the War Department or other Department having authority, regarding the treatment or retention of tubercular patients in said hospital as repugnant to the lease contract?

4. What report or representation, if any, was made to the Secretary of War or other responsible officer of the War Department, by an officer, or officers, detailed to examine and report upon a proposed takeover by the Public Health Service from the Surgeon General of said hospital property, regarding the inhibition in the Surgeon General's contract of treatment of tubercular patients in the hospital?

5. What protests, if any, were made by appellant to the officers in charge of said hospital regarding tubercular patients housed and undergoing treatment therein and what replies were given by said officers?

6. Whether or not some patients were retained and treated in said hospital for the diseases named and inhibited in said contract concurrently with other diseases.

7. Whether or not, during the retention of tubercular patients in said hospital, said fact was generally known in and about the city of Asheville, and, if it was, what was its effect on the value of the property in the public estimation?

8. Whether or not, during the tenancy and use of said hospital by the Surgeon General, there were housed and treated therein for syphilis persons having that disease in its tertiary stage.

9. Whether or not patients housed and treated in said hospital for tuberculosis were so housed and treated until November 8, 1918, when the leasehold of the Medical Corps terminated?

10. Whether in the spring and summer of 1919, as compared with the same period in former years, the high-class hotels of Asheville other than the Kenilworth had a large and lucrative patronage.

11. Whether during the same season persons who had planned to stop at the Kenilworth hotel while in Asheville, heard, on arriving there, that tubercular patients had been housed and treated in that building and for this reason went to other hotels instead.

12. To what amount, if any, the sale value of the Kenilworth property, as of November 8, 1919, when

the tenancy of the Surgeon General terminated, was impaired by the housing and treatment therein of tubercular patients.

13. To what amount or amounts in fact, if any, were the rental value of the Kenilworth property impaired on November 8, 1919, and on January 1, 1923, by housing and treatment therein of tuberculosis.

14. What would have been the cost in 1920 or 1923 of reconstructing the Kenilworth hospital building so as to remove all causes of infection with tuberculosis or syphilis.

15. What length of time would have been consumed in such reconstruction?

16. What was the rental value, during the time commencing on January 1, 1920, and the time commencing on January 1, 1923, necessary for such reconstruction of said hotel as it was when the Surgeon General took the lease of the same?

17. In the estimate and report of the Army Claims Board, narrated in par. XII of the Findings of Fact (Rec. pp. 23, 24) relative to physical damages, what reason, if any, was given by said board for not considering any damage appellant might have suffered, through the treatment or housing of the classes of patients named, in the hospital?

To show the probability that matters here indicated can be proved there are attached hereto appendices, as below, in relation to the respective items named:

Appendix A—Item 1.
Appendix B—Items, 2, 3 and 4.
Appendix C—Items 6 and 8.
Appendix D—Item 17.

There was before the Court of Claims, free of contradiction, impeachment, or inconsistency of any kind, evidences upon each of the items of this motion, but the court did not consider the same and made no findings upon those matters.

There was no evidence that the Government's officers "refused to accept the restriction as proposed" (Opinion Rec. p. 38). The utmost that, in any fair sense, can be said in this connection is that they "objected" to the use of the words "of treating" in the restriction of the use of the building (Findings, par. II, Rec. p. 17). It is true that these officers suggested the substitute set out in the finding, but that is an imperfect statement of what occurred. If the change was a matter of entirely amicable agreement between the parties, and they had no thought that they really were changing the contract, appellant assumes that the court will deem this material and will desire to have in the findings the text of the correspondence referred to.

After the decision and judgment of the Court of Claims, and within the time fixed by the rules of that court, appellant moved for amendment by said court of the findings of fact in the particulars that are contained in this motion, but the court denied that motion entirely.

Appellant moves that this court remand the case to the Court of Claims with directions that it, upon the evidence now in its record and any other competent evidence that the parties may submit, make and report to this court findings on the several questions of fact stated herein.

In the expectation that the court will set this motion to be heard at the same time, and in connection with, the case presented by the existing record, the two will be discussed in a single brief.

BENJAMIN CARTER,
Attorney for Claimant.

Appendix A

The Framing of the Contract—Item 1 of Motion

HEADQUARTERS SOUTHEASTERN DEPARTMENT

OFFICE OF QUARTERMASTER

Charleston, S. C.,
January 12, 1918.

In Reply
Refer To
481 (O. Q. M.)
Kenilworth Company.

From: Department Quartermaster.

To: Kenilworth Company, Kenilworth, Asheville, N. C.

Subject: Kenilworth Inn, Kenilworth, Asheville, N. C.

1. This office is in receipt of your offer of Dec. 11, 1917, to lease Kenilworth Inn and the grounds thereof to the Government; also the authority to enter into a lease with you for this property.

2. Before entering into the lease it is necessary that your offer be restated, as certain of the terms contained therein are in conflict with certain laws and regulations governing the entering into leases by the Government; one regulation is that no lease can extend beyond the close of any fiscal year; that is all Government leases terminate on June 30, that date being the end of the fiscal year. Hence, the lease made now cannot extend beyond June 30, 1918; however, there is a provision in the lease giving the Government the right of renewal for an indefinite time, which in this instance will be one year after a treaty of peace is signed between the United States and Germany. A lease entered into at the termination of the lease beginning February 1st, 1918, and ending June 30, 1918,

would be for a year, and would terminate on June 30, 1918.

3. Section 3648 Revised Statutes prohibits the Government from making payments in advance for any services or the delivery of articles of any description; accordingly, you could not be paid the rent in advance. Therefore, you are asked to redraft paragraph four of your offer. However, it is understood from a letter from the Surgeon General of the Army, that the rental for the first year shall be $115,000. For your information the lease can be so made as to provide for monthly payments of the rent on the first of the month for the calendar month just passed. In view of this statement, and also that the lease entered into now cannot extend beyond June 30, 1918, you are asked to restate the terms of your offer contained in the introductory and fourth paragraphs.

4. You are further asked to furnish this office with six blue prints or sketches of the property showing the boundary line of the whole tract, giving the courses and distances naming the owner or owners; giving any buildings, land marks, water courses, roads or other permanent improvements; state, county, etc., and the name of the engineer, scale and date.

5. In addition, you are asked to give the name of the corporation and in what county it is located, and under the laws of what state it is incorporated—also the names of the President and Secretary, and six certificates of the resolution giving these officers—mentioning their names—the authority to sign for the corporation.

6. A prompt reply to this communication giving the information desired, and the blue prints and certificates requested, will enable this office to make an early completion of the lease.

By direction:

R. C. Gresham,
2nd Lieut. Q. M. Corps, N. A.,
Assistant to Quartermaster.

RCG/dnw

I, Fred C. Kleinschmidt, Assistant Clerk of the Court of Claims, hereby certify that the foregoing matter is a correct copy of a copy of a letter which is a part of a report from the War Department filed in said court December 7, 1923, in the case of the Kenilworth Company v. the United States No. C-762.

Given under my hand and seal of said court this 5th day of March, 1926.

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

Asheville, N. C.,
January 15, 1918.

Surgeon General,
United States Army,
Washington, D. C.

Sir:

In accordance with the directions of the Quartermaster of the Southeastern Department, we are restating our proposal to you of December 11, 1917, covering the leasing of the Kenilworth Inn and grounds to the Government, changing and amending it to conform with the regulations pointed out by the Quartermaster's Office:

The Kenilworth Company, a North Carolina corporation, hereby proposes to enter into a contract of lease with the Government of the United States, whereby this Company will lease and the Government agrees to take, for the term of time from February 1, 1918, to June 30, 1918, the property known and described as Kenilworth Inn, and grounds thereof, in the town of Kenilworth, near the City of Asheville; in the State of North Carolina, including approximately four acres of bottom land on the Swannanoa River, and west of Kenilworth Road, upon the following terms and conditions:

(1) This company shall at once complete the erection of Kenilworth Inn, in accordance with the plans and specifications which were heretofore submitted to

you, except that no partitions or dividing walls indicated in red on said plans shall be installed; it being understood that all heating equipment and lighting fixtures are to be installed in the building, but this Company shall not provide any furniture or operating equipment.

(2) The building and property are to be leased to the Government for the purpose of a convalescent hospital for disabled officers or soldiers, but it is especially understood, and the lease shall so provide that no part of the property shall be used for the purpose of treating or housing any person suffering from tuberculosis in any form, or from smallpox, or any other like contagious or obnoxious disease, provided, however, that this shall not apply to a person suffering from tuberculosis, housed temporarily in said premises for an operation or the like.

(3) It is understood and agreed, and the lease shall provide that the Government shall maintain all buildings, equipment and machinery in good condition and repair, and at the termination of the lease deliver the same up to this Company in as good condition and repair as when leased, usual wear and tear and Acts of God to be excepted.

(4) The Government shall pay to this Company, as rental for said property, the sum of One Hundred and Fifteen Thousand ($115,000) Dollars for the first year of the term of the lease, and Seventy-five Thousand ($75,000) Dollars for each and every additional year of the term; the rent to be paid monthly on the first day of each and every month during the term of the lease, covering the rent for the calendar month just passed.

(5) The term of the lease proposed to be executed shall commence on the first day of February, 1918, and end on the 30th day of June, 1918; but the Government shall have the right and privilege under the contract of renewing the lease from year to year, for and during the continuation of the present war with Germany, and for one year after a Treaty of Peace has been signed between the United States and the German

Government. It is desired, but not insisted upon by this Company, that the contract of lease contain a clause, while not binding the Government in specific terms, to continue the lease in force for the duration of the war and one year; but at the same time stating that this is the spirit or understanding between the contracting parties.

Respectfuly submitted,

THE KENILWORTH COMPANY,

By: .....,

President.

I, Fred C. Kleinsemidt, Assistant Clerk of the Court of Claims, hereby certify that the foregoing matter is a correct copy of a copy of a letter which is a part of a report from the War Department filed in said court December 7, 1923, in the case of the Kenilworth Company v. the United States No. 305-A.

Given under my hand and seal of said court this 7th day of March, 1926.

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

HEADQUARTERS SOUTHEASTERN DEPARTMENT

OFFICE OF QUARTERMASTER

Charleston, S. C., January 17, 1918.

In reply
Refer to
481 (O. Q. M.)
Kenilworth Company.

From: Department Quartermaster.

To: Kenilworth Company, Kenilworth, Asheville, N. C.

Subject: Kenilworth Inn, Kenilworth, Asheville, N. C.

1. In reply to your letter 15th inst., and the offer therein to lease Kenilworth Inn and the grounds thereof to the Government for hospital purposes, this office requests you to restate paragraph 4 of the offer. This request is made in view of the fact that the lease entered into February 1, 1918, will expire June 30,

1918; and any statement covering amount to be paid for rental for "first year of the term of the lease" or "the first 12 months of the term of the said lease" would not be correct, for while the lease will contain a provision giving the right of renewal to one year after a treaty of peace is signed between the United States and Germany, yet the lease by law, will end on June 30, 1918, and a new lease will have to be entered into at that time to cover the period from July 1, 1918, to June 30, 1919, provided the Government desires to renew the lease.

2. Further, it is desired to change paragraph 2 of your offer so that it shall read, "the building and property are to be leased to the Government for the purpose of a convalescent hospital for disabled officers or soldiers, but it is especially understood, and the lease shall so provide, that no part of the property shall be used for the purpose of receiving for treatment any person suffering from tuberculosis in any form, or from smallpox, or any other like contagious or obnoxious disease, provided, however, that this shall not apply to a person suffering from tuberculosis, housed temporarily in said premises, for the purpose of a no operation or the like.

3. This office will appreciate your prompt reply in order that there may be no delay in executing the lease.

By direction:

R. C. GRESHAM,
2nd Lieut., Q. M. Corps, N. A.,
Asst. to Quartermaster.

RGC/DMW Recorded.

I, Fred C. Kleinschmidt, Assistant Clerk of the Court of Claims, hereby certify that the foregoing matter is a correct copy of a letter, which is a part of a report from the War Department filed in said court December 7, 1922, in the case of the Kenilworth Company v. the United States No. C-762.

Given under my hand and seal of said court this 5th day of March, 1926.

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

Asheville, N. C., Jan. 19th, 1918.

Refer to
481 (O. Q. M.)
Kenilworth Company.

From: The Kenilworth Company, Asheville, N. C.

To: Quartermaster, Southeastern Department.

Subject: Kenilworth Inn, Kenilworth, Asheville, N. C.

1. In obedience to your request contained in your letter of the 17th instant, we beg to re-state paragraph 2 of our proposal to the Surgeon General for the leasing of Kenilworth Inn, making the same to read as follows:

> "2. The building and property are to be leased to the Government for the purpose of a convalescent hospital for disabled officers and soldiers, but it is especially understood, and the lease shall so provide, that no part of the property shall be used for the purpose of receiving for treatment any person suffering from tuberculosis in any form, or from smallpox, or any other like contagious or obnoxious disease, provided, however, that this shall not apply to a person suffering from tuberculosis, housed temporarily in said premises, for the purpose of an operation or the like."

We also restate paragraph 4 of the proposal, making the same to read as follows:

> "4. The Government shall pay to this company for the use of said property a monthly rental of $9,583.33 for each month of the term thereof, and should the Government desire to renew said lease, it shall pay a monthly rental of $9,583.33 for the first seven months of said renewal term and a monthly rental of $6,250.00 for each month thereafter of said renewed term, the rent to be paid

monthly on the first day of each month covering the rerent for the calendar month just passed."

It is hoped that this will meet with your approval and that the lease can be executed without delay.

Very truly ours,

THE KENILWORTH COMPANY,

By:

President.

I, Fred C. Kleinschmidt, Assistant Clerk of the Court of Claims, hereby certify that the foregoing matter is a correct copy of a copy of a letter, which is a part of a report from the War Department filed in said court December 7, 1923, in the case of the Kenilworth Company v. the United States No. C-762.

Given under my hand and seal of said court this 5th day of March, 1926.

F. C. KLEINSCHMIDT,

Assistant Clerk Court of Claims.

Appendix B

Contemporaneous Interpretation of Contracts by Government Officers—Items 2, 3 and 4 of Motion.

(1) Surname, Bell; (2) Christian name, Thomas; (3) rank, Dis. officer, 1st Lt.; (4) Company ——; (5) Regiment or Staff Corps. Last served as M. C., U. S. A.; (6) Age, yrs., 31; (7) Race, W.; (8) Nativity, Ky.; (9) Service, yrs. ——; (10) Register No. 766.

(11) Date of Admission, Oct. 12, 1919.

(12) Source of Admission, A. R. 1473.

(13) Cause of Admission, under observation for tuberculosis, pulmonary. Hosp.

(14) In line of duty?—

(15) Complication, Seq., Etc., Nov. 12/18. Diagnosis changed to tuberculosis, pulmonary, acute, left, hydropneumothorax, right upper lobe, acute infiltration. TB found in sputum.

(16) Disposition, left hospital.

(17) Date of Disposition, June 17, 1919.

(18) Name of Hosiptal, Etc., U. S. A. Gen. Hosp. No. 12, Biltmore, N. C.

(19) Sent with report of S. & W. for month of June, 1919.

(20) From Same.

(21) T. M. S. 1st M. C. U. S. Army.

(22) Days of treatment in current case, current year.

Year 1919 In Quarters	In Hospital
January	31
February	28
March	31
April	30
May	31
June	16
July	..
August	..
September	..
October	..
November	..
December	..
Total	167

I, Fred C. Kleinschmidt, Assistant Clerk of the Court of Claims, hereby certify that the foregoing matter is a correct copy of a copy of a letter, which is a part of a report from the War Department filed in said court February 14, 1922, in the case of the Kenilworth Company v. the United States No. 305-A.

Given under my hand and seal of said court this 5th day of March, 1926.

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

705. 1 Disposition of patients. Transfer of Dr. Bell.

January 23, 1919.

Commanding Officer.

Commanding Officer, U. S. A., General Hospital No. 19, Oteen, N. C.

Dr. Thomas C. Bell.

1. Dr. Thomas C. Bell, discharged from the Army on account of disability, now a patient at this hospital, has chronic pulmonary tuberculosis.

2. Due to the fact that patients suffering from tuberculosis are not to be treated at this hospital in conformity with agreement with lease executed between the owner of the buildings and the Government, this man will have to be discharged from hospital.

3. Information is requested as to whether or not he can be accompanied at your hospital. Dr. Bell is receiving compensation from the Bureau of War Risk Insurance and is entitled to treatment in a Government hospital.

4. An early reply will be appreciated.

JOHN B. MCCREARY,
Major, M. C., U. S. A.

JC/h.

1st Ind.

C. O., No. 19, General Hospital,
Oteen, N. C., Jan. 25th, 1919.

To the Surgeon General, U. S. A., atten. Colonel Roger Brooks,

1. Inviting attention of paragraph 3 of the above letter. In view of the fact that Dr. Bell is receiving compensation from Bureau of W. R. I., it is not believed that he is entitled to treatment in this hospital.

2. Request ruling in this case.

HENRY W. HOAGLAND,
Lieut. Col. Med. Corps., Commanding.

S. G. O. 210 Bell, Thomas. sjm/eec

2nd Ind.

War Department, S. G. O.,
January 19, 1919.

To Commanding Officer, General Hospital No. 19, Oteen, N. C.

1. Returned.

2. There is no authority for the admission of discharged officers or soldiers to any Army hospital for treatment.

By direction of the Surgeon General.

S. J. MORRIS,
Col. Med. Corps.

3rd Ind.

C. O., Gen. Hosp., No. 19,
Oteen, N. C., January 31, 1919.

To Commanding Officer, General Hospital No. 12, Biltmore, N. C.

1. Forwarded, inviting attention to 2nd Ind.

By order of Lieutenant Colonel Hoagland.

G. E. VASS,
Capt. S. C., U. S. A., Adjutant.

4th Ind.

S. G. O. 201 Bell, Thomas C. JC/h.
U. S. A. General Hospital No. 12,
Biltmore, N. C., February 2, 1919.

To the Surgeon General, U. S. Army, Washington, D. C.

1. Returned. It is requested that information be furnished relative to the interpretation of par. 3, section 302, act of Congress, approved October 6, 1917, as amended, and published in Bulletin No. 41, War Department, 1918, page 13.

2. If, under the provisions of the above, Dr. Bell is not entitled to treatment in an army hospital, it is requested that this office be informed as to what Government hospital he, or other discharged officers and enlisted men, who desire and are in need of hospital treatment, can be advised to apply for admission.

JOHN B. MCCREARY,
Major, M. C., U. S. A., Commanding.

705—Transfer Dr. Bell to G. H. at Albequerque.

10th Ind.

C. O., U. S. A., General Hospital No. 19.
Oteen, N. C., March 30, 1919.

To the Commanding Officer, General Hospital No. 12, Biltmore, N. C.

1. Forwarded for information and return of these papers as requested. In view of the 7th indorsement, it is presumed that it will be more convenient for all concerned if Dr. Bell proceeds directly from General Hospital No. 12 to Albuequerque rather than being transferred to General Hospital No. 19 prior to leaving for Albuquerque.

WM. LYSTER,
Colenel, M. C., U. S. A., Commanding.

11th Ind.

WL:LM

(S. G. O., 201 Bell, Thomas C.)

U. S. A. General Hospital No. 12,
Biltmore, N. C., April 1, 1919.

To the Commanding Officer, U. S. A., General Hospital No. 19, Oteen, N. C.

1. Returned. Contents noted. Dr. Bell will remain at this hospital until his transfer to Albuquerque, New Mexico.

JOHN B. MCCREARY,
Major, M. C., U. S. A., Commanding.

I, Fred C. Kleinschmidt, Assistant Clerk of the Court of Claims, hereby certify that the foregoing matter is a true copy of a copy of a letter with indorsements thereon, which is a part of a report from the War Department filed in said court February 14, 1922, in the case of the Kenilworth Company v. the United States No. 305-A.

Given under my hand and seal of said court this 5th day of March, 1926.

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

War Department Claims Board
Appraisal Section
War Trade Board Building
Washington

WPM/rp

September 2, 1921.

From: War Department Claims Board, Appraisal Section, War Trade Bldg.
To: Public Health Service, Treasury Department.
Subject: Claim of the Kenilworth Company, Asheville, N. C.

1. There is pending before this board for determination the claim of the Kenilworth Company, owner of the Kenilworth Inn, North Carolina, for damages to property while under lease to the United States for hospital purposes, in the total sum of $158,721.32. The claim contains other items, but the amount above is alleged to be the cost of restoration of the premises to the same condition as when leased, this being an obligation on the part of the United States under the lease to the War Department and also the lease to the Treasury Department.

2. While it appears that the obligation on the part of the War Department to pay the cost of restoration, so far as such cost is attributable to the War Department, may have already accrued, it is practically impossible to make a definite ascertainment of the proper allocation of proportions of items between the

War Department and the Treasury Department without cooperative action on the part of both departments. It is also recognized that the Treasury Department would be in no way bound by whatever determination might be made by the War Department as to the cost of restoration or the allocation thereof.

3. By reason of a breach of contract by the United States, in that this property was used for tubercular and contagious patients in violation of the express terms of the lease to the War Department, the claimant is in serious financial difficulty because of inability to renew loans, and in fairness to the claimant it is believed that whatever sum has already accrued and is due from the War Department should be paid as soon as possible, without waiting for final vacation of the premises by the Public Health Service.

4. It is the opinion of this Board that the only practicable way to determine this matter is by joint action of this Board and the proper department of the Public Health Service to determine the total amount due claimant under the restoration clauses of the leases and the proportion of such total that should be allocated to the War Department and the Treasury Department.

5. It is, therefore, requested that action along the lines above indicated be taken.

WAR DEEPARTMENT CLAIMS BOARD,
APPRAISAL SECTION.

By (Signed) W. P. MONTGOMERY,
Captain, J. A. G. D.

I, F. C. Kleinschmidt, Assistant Clerk of the Court of Claims, hereby certify that the foregoing matter is a correct copy of a copy of a letter, which is a part of a report of the Comptroller General filed in said Court December 7, 1923, in the case of the Kenilworth Company v. the United States No. C-762.

Given under my hand and seal of said court this 5th day of March, 1925.

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

WGS/GRH

August 20, 1919.

The Director of Operations, U. S. A.,
Office of the Chief of Staff,
War Department,
Washington, D. C.

Sir:

Owing to the large number of discharged soldiers suffering from *tuberculosis* who are applying to this Service for relief, serious consideration is being given to the question of asking the Army to transfer the lease of U. S. General Hospital No. 12, Biltmore, N. C., to this Service when it is released by the Army. This Bureau is now in communication with the owners to ascertan if the owners will permit the use of this hospital for tuberculosis patients. An answer is expected the latter part of this week and as soon as it is received the question of asking for this transfer will be decided and you will be immediately advised. Will you kindly issue instructions that this hospital be not dismantled until it is ascertained whether or not this Service can use it for the care and treatment of discharged soldiers suffering from tuberculosis.

Respectfully,

J. C. Perry,
Acting Surgeon General.

Memo

In view of the fact that renewal of the present Army lease would not give the Service the privilege of treating tubercular patients, and that a new lease based on five year occupancy with the privilege of buying will permit the treatment of any class of patients of the Service, it is requested that a five-year lease be executed, carrying the general provisions contained in the lease obtained for the Mt. Alto property in Washington, with a stipulation as to the value at which the property may be purchased, and embodying the credit of $25,000 per annum towards the purchase price, as outlined in telegram from the President of the Kenilworth Company, dated August 31, 1919.

I, Fred C. Kleinschmidt, Assistant Clerk of the Court of Claims, hereby certify that the foregoing matter is a true copy of a copy of a letter with "memo" attached thereto, which is a part of a report from the War Department filed in said court December 7, 1923, in the case of the Kenilworth Company v. the United States No. C-762.

Given under my hand and seal of said court this 5th day of March, 1926.

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

Appendix C

Card Records of Patients in Hospital—
Items 6 and 8 of Motion

REPORT

1821009. (1) Surname, Largen; (2) Christian Name, William C.; (3) Rank, Pvt.; (4) Company, D; (5) Regiment or Staff Corps, 318 Inf.; (6) Age, Yrs., 25; (7) Race, W.; (8) Nativity, Va.; (9) Service, Yrs., 10/12; (10) Register No. 361; (11) Date of Admission, July 22, 1918; (12) Source of Admission, Base Hosp., Camp Lee, Va., Admission, May 2/18, Reg. No. 3048; (13) Cause of Admission, For convalescence following Pleurisy, sero-fibrinous, acute, tuberculosis, right, at Base Hospital, Camp Lee, Va., May, June, and July, 1918. (a) Hosp. (14) In Line of Duty? Yes; (15) Complication, Sec., Etc. (16) Disposition, Transferred to U. S. A. Gen. Hosp. No. 19, Azalea, N. C.; (17) Date of Disposition, Oct. 6, 1918; (18) Name of Hospital, Etc., U. S. A. General Hospital No. 12, Biltmore, N. C.; (19) Sent with Report of S. & W. for Month of Oct., 1918; (20) From Same; (21) D. R. C., Capt. M. G., U. S. Army.

Classification:

(22) No. — of Disposition.
(23) No. — of Admission.
(24) Sub. No. —.
(25) Sub. No. —.

(26) Days of Treatment in Current Case, Current Year:

Year 1918	In Quarters	In Hospital
January		..
February		..
March		..
April		..
May		..
June		..
July		10

August	31
September	30
October	5
November	..
December	..
Total	96

(a) Corrected entry (Pleurisy, sero-fibrinous, acute, right. Changed to read Pleurisy, sero-fibrinous acute, tuberculosis, right.

I, Fred C. Kleinschmidt, Assistant Clerk of the Court of Claims, hereby certify that the foregoing matter, is a correct copy of a copy of a card record, which is a part of a report from the War Department filed in said court February 14, 1922, in the case of the Kenilworth Company v. The United States No. 305-A.

Given under my hand and seal of said court this 5th day of March, 1926.

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

---

(1) Surname, Wright; (2) Christian Name, Crispin; (3) Rank, 1st Lt.; (4) Company, —; (5) Regiment or Staff Corps, M. C. U. S. A.; (6) Age, Yrs., 36; (7) Race, W.; (8) Nativity, Va.; (9) Service, Yrs., 1 2/12; (10) Register No. 696.

(11) Date of Admission, Sept. 11, 1918.

(12) Source of Admission, U. S. A. Gen. Hosp. No. 18, Waynesville, N. C. No. T. C. received.

(13) Cause of Admission.—Tuberculosis, pulmonary, chronic, active, left upper lobe. Hosp.

(14) In line of duty? Yes.

(15) Complication, Sec., Etc. (1) Tuberculosis of kidney, left, LD. Yes. (2) Tuberculosis of bladder, ulcerative. LD. Yes.

(16) Disposition. Transferred to Gen. Hosp. No. 19 U. S. A. Azalea, N. C.

(17) Date of disposition. Nov. 4, 1918.

(18) Name of Hospital, Etc. U. S. Gen. Hosp. No. 12, Biltmore, N. C.

(19) Sent with report of S. W. for month of Nov. 1918.

(20) From same.

(21) D. R. Childs, Capt. M. C., U. S. Army.

(22) Days of treatment in current case, current year:

Year 1918	In Quarters	In Hospital
	September	20
	October	31
	November	3
	Total	54

I, Fred C. Kleinschmidt, Assistant Clerk of the Court of Claims, hereby certify that the foregoing matter is a correct copy of a copy of a card received, which is a part of a report from the War Department filed in said court February 14, 1922, in the case of the Kenilworth Company v. the United States No. 305-A.

Given under my hand and seal of said court this 5th day of March, 1926.

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

A. S. No. 1554351

(1) Surname, King; (2) Christian Name, Ol; (3) Rank, Private; (4) Company, M; (5) Regiment or Staff Corps, 7th Inf.; (6) Age, Yrs., 25; (7) Race, W; (8) Nativity, Tenn.; (9) Service, Yrs., 1 6/12; (10) Register No. 1645-2060; (11) Date of Admission, May 13, 1919; (12) Source of Admission, Furlough. Proper Station, A. E. F.; (13) Cause of Admission, (Old) Bronchitis, Chronic, catarrhal, bilateral, following inhalation of gas received while with A. E. F. at Chateau Thierry, France, July 14/18; Hosp.

(14) In Line of Duty? Yes.
(15) Complication, Seq., Etc., May 29/19. Add. Diag. Tuberculosis, pulmonary, right upper lobe, TB found in sputum. In LD.
(16) Disposition. Trans. to Gen. Hosp. No. 19, Oteen, N. C.
(17) Date of Disposition. June 12, 1919.
(18) Name of Hospital, Etc. U. S. A. General Hospital No. 12, Biltmore, N. C.
(19) Sent with report of S. & W. for month of June, 1919.
(20) From Same.
(21) T. M. S. 1st Lt. M. C. U. S. Army.
(22) Days of Treatment in Current Case, Current Year:

Year 1919	In Quarters	In Hospital
January		..
February		..
March		..
April		..
May		19
June		11
July		..
August		..
September		..
October		..
November		..
December		..
Total		30

I, Fred C. Kleinschmidt, Assistant Clerk of the Court of Claims, hereby certify that the foregoing matter, is a correct copy of a copy of a card record, which is a part of a report from the War Department filed in said court February 14, 1922, in the case of the Kenilworth Company v. The United States No. 305-A.

Given under my hand and seal of said court this 5th day of March, 1926.

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

1825069. (1) Surname, Ferree; (2) Christian Name, Marshall J.; (3) Rank, Pvt.; (4) Company, C; (5) Regiment or Staff Corps, 319th Inf.; (6) Age, Yrs., 31; (7) Race, W; (8) Nativity, Pa.; (9) Service, Yrs., 4/12; (10) Register No. 112; (11) Date of Admission, June 22, 1918; (12) Source of Admission, Base Hosp. Camp Lee, Va. Orig. Adm. Mar. 16/18, Reg. No. 6080; (13) Cause of Admission. 1. (Old) Laryngitis, chronic. Existed prior to active service. 2. (Old) Tuberculosis, pulmonary, chronic left upper lobe. 3. (Old) Fibrosis, left upper lobe of lung. Result of bullet wound received. (a) (14) In Line of Duty? 1 No, 2 No. 3 No, 4 Yes, 5 Yes; (15) Complication, Seq. Etc., July 26/18 Resection of 4th rib, right with incision and drainage of lung abscess, in LD N20, 0, ether date of onset March 15, 1918. (16) Disposition, Furlough cure not complete; (17) Date of Disposition, December 4, 1918; (18) Name of Hospital, Etc., U. S. A. General Hospital No. 12, Biltmore, N. C.; (19) Sent with Report of S. & W. for Month of December 1918; (20) from Same; (21) F. J. W. Major M. C. U. S. Army.

Classification:

(22) No. — of Disposition.
(23) No. — of Admission.
(24) Sub. No. —.
(25) Sub. No. —.

(26) Days of Treatment in Current Case, Current Year:

Year 1918	In Quarters	In Hospital
January	..	..
February	..	..
March	..	..
April	..	..
May	..	..
June	..	9
July	..	31
August	..	31
September	..	30
October	..	31

November	30
December	4
Total	166

(a) Prior to active service.

4. (Old) Pleurisy, suppurative, right.

5. (Old) Wound unhealed following operation for pleurisy, suppurative, right at Camp Lee, Va. (No date nor record of operation given on TC) Bronchopneumonia as on TC cured on admission to this hospital.

I, Fred C. Kleinschmidt, Assistant Clerk of the Court of Claims, hereby certify that the foregoing matter, is a correct copy of a copy of a card record, which is a part of a report from the War Department filed in said court February 14, 1922, in the case of the Kenilworth Company v. The United States No. 305-A.

Given under my hand and seal of said court this 5th day of March, 1926.

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

A. S. No. 807509.

(1) Surname, Scott; (2) Christian Name, Frank R.; (3) Rank, Pvt.; (4) Company, A. C. No. 42; (5) Regiment or Staff Corps, Med. Dept. U. S. A.; (6) Age, Yrs., 32; (7) Race, W; (8) Nativity, Mich.; (9) Service, Yrs, 10/12; (10) Register No. 1308.

(11) Date of Admission. January 22, 1919.

(12) Source of Admission. G. H. No. 14, Ft. Oglethorpe, Ga. Adm. Apr. 29/18. Reg. No. 15665 (a).

(13) Cause of Admission. 1. (Old) Abscess, psoas, bilateral, chronic, cause undetermined. (a) 2. Convalescing from operation and drainage of: abscess, psoas, left, chronic, at G. H. No. 14, Ft. Oglethorpe, Ga. Aug. 7/18. 3. Tuberculosis, bone, chronic, involving 4th and 5th lumbar vertebrae and sacrum (c). Hosp.

(14) In line of duty? 1 Yes, 2 Yes, 3 Yes, 4 Yes, 5 Yes.

(15) Complication, Seq., Etc. May 22/19. Diagnosis No. 3, changed to Caries of the 3rd and lumbar vertebrae, tubercular. In LD.

(16) Disposition. Died. Cause of death: Psoas abcess, amyloid disease and caries of the 3rd and 4th lumbar (d).

(17) Date of Disposition. May 22, 1919.

(18) Name of Hospital, Etc. U. S. A. General Hospital No. 12, Biltmore, N. C.

(19) Sent with report of S. & W. for month of May, 1919.

(20) From Same.

(21) J. A. B. 1st Lt. M. C. U. S. Army.

(22) Days of treatment in current case, current year:

Year 1919	In Quarters	In Hospital
January		10
February		28
March		31
April		30
May		22
Total		121

(a) Orig. Adm. Inf. Motorized F. H. Camp Greenleaf, Ga.

(b) Corrected entry: Location of abscess changed from "left" to "bilateral."

I, Fred C. Kleinschmidt, Assistant Clerk of the Court of Claims, hereby certify that the foregoing matter, is a correct copy of a copy of a card record, which is a part of a report from the War Department filed in said court February 14, 1922, in the case of the Kenilworth Company v. The United States No. 305-A.

Given under my hand and seal of said court this 5th day of March, 1926.

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

1871963. (1) Surname, McCutchen; (2) Christian Name, Willie, (3) Rank Pvt.; (4) Company C; (5) Regiment or Staff Corps 528 Lbr. Bn.; (6) Age, Yrs. 30; (7) Race C.; (8) Nativity, S. C.; (9) Service, Yrs. 5/12; (10) Register No. 369; (11) Date of Admission, July 27, 1918; (12) Source of Admission, Infirmary, Pisgah Forest Adm. July 23/18; Reg. No. 41; (13) Cause of Admission, 1, Syphilis, tertiary, manifested by positive Wasserman. 2, Lumbar pains, due to post-operative adhesions—kidney operation performed Aug. 3/17 at John Hopkins Hosp., Baltimore, Md. (Patient's statement.) 3, Hernia, ventral, small, post-operative Hosp. (a) (14) In Line of Duty? 1, No, 2, No, 3, No. (15) Complication, Seq., Etc., Dec. 7/18, Add. Diag. Ulcer and necrosis of anterior surface, elbow, right, following salvarsan intravenous injection 2½ mo. ago at Gen. Hosp. No. 12, Biltmore, N. C. Not LD. Dec. 7/18, Operation; Skin-plastic (c). (16) Disposition. Dscharged from service by reason of discharge of Organization. Condition on discharge: (b) (17) Date of Disposition Feb. 21, 1919; (18) Name of Hospital, Etc., U. S. A. General Hospital No. 12, Biltmore, N. C. (19) Sent with Report of S. & W. for month of February, 1919. (20) From Same. (21) T. M. S. 1st Lt., M. C., U. S. Army.

Classification:

(22) No. Of Disposition.
(23) No.—Of Admission.
(24) Sub. No.
(25) Sub. No.

(26) Days of Treatment in Current Case Current Year.

Year 1919	In Quarters	In Hospital
January		31
February		21
March		..
April		..
May		..
June		..
July, 1918		5

August	31
September	30
October	31
November	30
December	31
Total	210

(a) In apppendix scar from operation performed Aug. 3/17 at Johns Hopkins Hosp., Baltimore, Md. (According to patient's statement.) TCD not concurred in.

(c) And skin-graft, anterior surface, right elbow. An: Ether, Int.: 2½ Mo. since injection of salvarsan. Not LD.

(b) Clinically cured.

I, F. C. Kleinschmidt, Assistant Clerk of the Court of Claims, hereby certify that the foregoing matter is a correct copy of a copy of a card record, which is a part of a report from the War Department filed in said court February 14, 1922, in the case of the Kenilworth Company v. the United States No. 305-A.

Given under my hand and seal of said court this 5th day of March, 1926.

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

107146 (c) (1) Surname, Grffin; (2) Christian Name, Elder; (3) Rank, Pvt.; (4) Company B; (5) Regiment or Staff Corps, 369 Inf.; (6) Age, Yrs. 22; (7) Race C.; (8) Nativity, Va.; (9) Service, Yrs. 1-2/12; (10) Register No. 399; (11) Date of Admission, Aug. 1, 1918; (12) Source of Admission, Embk. Hosp. Newport News, Va.; Adm. July 20/18, Reg. No. 12637 (a) (13) Cause of Admission, 1. (Old) Anthritis, chronic, involving both hips and knees—cause unknown. 2. (Old) Syphilis, tertiary, manifested by skin lesions, scars of leg ulcers, roughened tibiel crests, and history. Wasserman, positive. (b) Hosp. (14) In Line of Duty? 1. Yes; 2. No; (15) Complication, Sec., Etc. (16)

Disposition. Discharged on C. of D. on acct. of Arthritis, chronic as under 13. Deg. of Dis. ¼; (17) Date of Disposition, Feb. 6, 1919; (18) Name of Hospital, Etc., U. S. A. Gen. Hosp. No. 12, Biltmore, N. C.; (19) Sent with Report of S. & W. for Month of Feb., 1919; (20) From Same; (21) T. M. S. 1st Lt., M. C., U. S. Army.

Classification:

(22) No. — of Disposition.
(23) No. — of Admission.
(24) Sub. No. —.
(25) Sub. No. —.

(26) Days of Treatment in Current Case Current Year.

Year 1919	In Quarters	In Hospital
January		31
February		6
March		..
April		..
May		..
June		..
July		..
August, 1918		31
September		30
October		31
November		30
December		31
Total		190

(a) Orig. Adm. Base Hosp. No. 8, AEF, July 8, 1918. Reg. No. not given.

(b) Corrected entry. Report of Wasserman added.

(3) Correct Serial Number as from SR.

I, Fred C. Kleinschmidt, Assistant Clerk of the Court of Claims, hereby certify that the foregoing matter, is a correct copy of a copy of a card record, which is a part of a report from the War Department

filed in said court February 14, 1922, in the case of the Kenilworth Company v. The United States No. 305-A.

Given under my hand and seal of said court this 5th day of March, 1926.

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

---

(1) Surname, Gutte; (2) Christian Name, Karl; (3) Rank ——; (4) Company ——; (5) Regiment or Staff Corps, Interned Alien Enemy; (6) Age, Yrs. 34; (7) Race, W.; (8) Nativity, Germany; (9) Service, Yrs. ——; (10) Register No. 507; (11) Date of Admission, August 13, 1918; (12) Source of Admission, U. S. Int. Stn. Inf. Hot Springs, N. C. Adm. Aug. 1/18. Reg. No. 106; (13) Cause of Admission, 1. (Old) Typhoid fever; 2. Bed-sores. 1st dose typhoid prophlaxis administered about Aug. 1/18, patient's statement. Hosp.; (14) In Line of Duty? (15) Complication, Seq., Etc., Nov. 7/18, Add. Diag. Syphilis, tertiary, (Wassermann neg.afte r 6 salvarsans) Jan. 12/19 Add. Diag. Influenza, Cured Jan. 22, 1919. (16) Disposition, Left Hospital, sent to W. P. B., Ft. Oglethorpe, Ga.; (17) Date of Disposition, Feb. 7, 1919; (18) Name of hospital, Etc.; U. S. A. General Hospital No. 12, Biltmore, N. C.

(19) Sent with Report of S. & W. for month of , 19 .

(20) From Same.

(21) T. M. S. 1st Lt., M. C., U. S. Army.

Classification:

(22) No. — of Disposition.
(23) No. — of Admission.
(24) Sub. No. —.
(25) Sub. No. —.

(26) Days of Treatment in Current Case, Current Year.

Year 1919	In Quarters	In Hospital
January		31
February		7
March		..
April		..
May		..
June		..
July		..
August		19
September		30
October		31
November		30
December		31
Total		179

I, Fred C. Kleinschmidt, Assistant Clerk of the Court of Claims, hereby certify that the foregoing matter, is a correct copy of a copy of a card record, which is a part of a report from the War Department filed in said court February 14, 1922, in the case of the Kenilworth Company v. The United States No. 305-A.

Given under my hand and seal of said court this 5th day of March, 1926.

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

Correction Card No. 1885989.

(1) Surname Littlejohn; (2) Christian Name, Worth; (3) Rank Pvt.; (4) Company C; (5) Regiment or Staff Corps, 444 Res. Lbr. Bn.; (6) Age, Yrs. 24; (7) Race, C.; Nativity, S. C.; (9) Service, Yrs. 8/12; (10) Register No. 889; (11) Date of Admission Nov. 18, 1918; (12) Source of Admission, Infmry, Pisgah Forest, N. C.; Adm. Nov. 18/18; No. Reg., No. unknown; (13) Cause of Admission, 1. Nephritis, chronic, parenchymatous; 2, Syphilis, tertriary, manifested by scar on penis and positive Wassermann (both existed prior to active service) Hosp.; (14) In Line of Duty? 1, No. 2, No. (a) (15) Complication, Seq., Etc., ———; (16) Disposition, Furlough; cure notcomplete; (17) Date of Disposition, March 30,

1919; (18) Name of Hospital, Etc., U. S. A. Gen. Hosp. No. 12, Biltmore, N. C.; (19), Sent with Report of S. & W. for Month of Mar., 1919; (20) From Same; (21) John B. McCreary, Major, M. C., U. S. Army.

(22) Days of Treatment in Current Case, Current Year.

Year 1919	In Quarters	In Hospital
January		31
February		28
March		30
April		..
May		..
June		..
July		..
August		..
September		..
October		..
November, 1918		13
December		31
Total		133

Corrected entry:

(a) Line of duty erroneously reported on report card of March, 1919.

(Correction Card.)

(Letter date of)

4-17-19.)

I, Fred C. Kleinschmidt, Assistant Clerk of the Court of Claims, hereby certify that the foregoing matter, is a correct copy of a copy of a card record, which is a part of a report from the War Department filed in said court February 14, 1922, in the case of the Kenilworth Company v. The United States No. 305-A.

Given under my hand and seal of said court this 5th day of March, 1926.

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

A. S. No.

(1) Surname, Gallrein; (2) Christian Name, Ernest; (3) Rank; (4) Company, interned; (5) Regiment or Staff Corps, Alien Enemy; (6) Age, Yrs. 53; (7) Race, W.; (8) Nativity, Germany; (9) Service, Yrs.; (10) Register No. 328; (11) Date of Admission, July 15, 1918; (12) Source of Admission, Merriweather Hosp., Asheville, N. C.

(13) Cause of Admission, 1. Syphilis, tertiary, aneurism, ascending aorta, Wassermann one plus; 2. Endocarditis, chronic, syphilitic, aortic regurgation. Hosp.

(14) In Line of Duty?

(15) Complication, Seq., Etc.

(16) Disposition, Left Hosp. (delivered to Dep. U. S. Marshal, Asheville, N. C.)

(17) Date of Disposition, November 15, 1918.

(18) Name of Hospital, Etc., U. S. A. General Hospital No. 12, Biltmore, N. C.

(19) Sent with Report of S. W. for month of Nov., 1918.

(20) From Same.

(21) D. R. C. Capt. Mc., U. S. Army.

(22) Days of Treatment in Current case, Current Year.

Year 1918	In Quarters	In Hospital
January	.....	.....
February	.....	..
March	.....	..
April	.....	..
May	.....	..
June	.....	..
July	.....	17
August	.....	31
September	.....	30
October	.....	31
November	.....	14
December	.....	..
Total	.....	123

I, Fred C. Kleinschmidt, Assistant Clerk of the Court of Claims, hereby certify that the foregoing matter is a true copy of a copy of a letter which is a part of a report from the War Department filed in said court February 14, 1922, in the case of the Kenilworth Company v. the United States No. 305-A.

Given under my hand and seal of said court this 5th day of March, 1926.

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

Appendix D

Claims Board's Disclaimer of Jurisdiction

153-FC-7 (Kenilworth Co.)

OFFICE OF THE CHIEF OF FINANCE

Washington, D. C., November 1, 1921.

To: General Accounting Office, War Dept. Division, Washington, D. C.

1. Forwarded herewith is claim of Kenilworth Company, Asheville, N. C., for restoration of building, $158,721.32 and damage to property through violation of lease, $500,000.

2. The War Department Claims Board has recommended that the claim for restoration of building be approved for $81,066.82, of which $10,707.28 is payable by the Public Health Service and $70,359.54 by the War Department. The Board disclaims jurisdiction over the item of $500,000.

3. Some of the items of charge appear to be high, but claimant has verbally stated that the fittings and material were high class and expensive, such as would be expected in a hotel of the first class.

4. Correspondence herewith indicates that it was the intention of the contracting parties in making restoration to place the building in condition for hotel purposes, but the lease provides only for the maintenance of buildings, equipment and machinery in good condition and repar and for delivery of same at the expiration of the lease in as good condition and repair as when leased, usual wear and tear and acts of God excepted.

5. As the damages are not set forth in the contract of lease and are subject to review and adjustment in your office the complete file is forwarded recommend-

ing direct settlement. Acceptance of claimant in said amount of $70,359.54 is herewith.

H. M. Lord,
Chief of Finance, U. S. S.,

Encls: File.

By: H. S. Gott,
Chief, Claims Division.

I, F. C. Kleinschmidt, Assistant Clerk of the Court of Claims, hereby certify that the foregoing matter is a correct copy of a copy of a letter, which is a part of a report of the Comptroller General filed in said court December 7, 1923, in the case of the Kenilworth Company v. the United States No. C-762.

Given under my hand and seal of said court this 5th day of March, 1925.

F. C. Kleinschmidt,
Assistant Clerk Court of Claims.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

THE KENILWORTH COMPANY, *Appellant*,
v.
THE UNITED STATES, *Appellee*
} No. 240

Appeal from the Court of Claims

Brief for Appellant on Its Appeal and on Motion for Remand to Court of Claims.

BENJAMIN CARTER,
Attorney for Claimant.

JUNIUS G. ADAMS,
Of Counsel.

CASES CITED

United States v. Bostwick, 94 U. S. 53..... 7
Delano v. Smith, 206 Mass. 365..... 7
Hersey v. Chapin, *et als.*, 162 Mass. 176..... 7
Higgins v. Los Angeles Gas & Electric Co., 159 Calif. 651.....8, 9
Cooper v. Kankakee Electric Light Co., 164 Ill. App. 581 8
Donk Bros. Coal & Coke Co. v. Novero, 135 Ill. App. 633 8
Adams & Sullivan v. Seugel, 177 Ky. 535..... 8
Toebbe v. City of Covington, 145 Ky. 763..... 8, 9
C., N. O. & T. P. Ry. Co. v. Falconer (Ky. unofficial), 97 S. W. 729..... 8, 9
Wiggins v. St. L., M. & S. E. Ry. Co., 119 Mo. App. 8
Slavin v. State, 152 N. Y. 45..... 8
Bigbee Fertilizer Co. v. Scott, 3 Ala. 333..... 8, 9
Roach v. Blair, 190 Mich. 11..... 8
Barrick v. Schifferdecker, 132 N. Y. 52..... 8
Graessle v. Carpenter, 70 Ia. 116..... 8
McGregor v. Board of Education, 101 N. Y..... 10

IN THE

Supreme Court of the United States

THE KENILWORTH COMPANY

v.

THE UNITED STATES

No. 240

BRIEF

Appellant believes that upon examining its motion for a remand to the Court of Claims for the purpose of amplifying the findings the court will recognize that this goes deep into the merits of the cases, and therefore that it would be unprofitable to hear argument upon the present record alone. This brief, therefore, will treat both of the record and of the motion for a remand.

The appeal brings before the court a second Court of Claims suit of the Kenilworth Company growing out of damage done to property, during a lease to the War Department in 1918 and 1919, by the housing and treatment, in violation of express contract, of patients suffering with tuberculosis, syphilis, or other contagious and offensive diseases; the first case having been dimissed without prejudice on June 18, 1923. The Public Health Service succeeded the War Depart-

ment in possession and use of the property, taking a separate lease in November, 1919, and turned it back to claimant as of January 1, 1923. In the former case there was superabundant proof on both sides. Among the facts to which claimant's President and Manager, Mr. J. M. Childes, testified were that, in sight of this repossession of the property, he had tried diligently to rent it for a hotel or hospital, or any proper use whatever, but had not been able to obtain a single offer; and that the company's only recourse would be to inaugurate and operate a hotel itself at an inevitable and heavy loss of money long enough for the property to live down its reputation as a tubercular hospital. When this first case was called for hearing, on June 12, 1923, claimant's chief attorney stated that the company had in fact opened the hotel and that the expense to date had far outrun the receipts. The court there interposed, suggesting that the claim would have a more satisfactory aspect if this were of record, and therefore that the suit would better be dismissed, a new one instituted and proof made of the fact stated, to be used with the record already presented. That suggestion was followed by counsel; the present suit being instituted on June 20 following.

The injury to the property occurred under a contract of date January 21, 1918, with the Surgeon General of the Army, and renewals thereof, which were to run to June 30, 1920, and did run to November 8, 1919. (Record pp. 8-11.) The Public Health Service took the property over on the latter date and held it for some three years under a lease to terminate on November 8, 1924. A supplemental contract of that bureau was signed on November 10, 1922, terminating the lease on December 31 following. (Record pp. 9, 10, 20, 21.)

By testimony taken for claimant it was established that the physical renovation of the interior of the hotel building, so as to clear away all seeds of the disease named, for exclusion, in the War Department lease, would cost not less than $325,000; that to repair breakage, in excess of ordinary wear and tear, which occurred during the Public Health Service's holding, claimant has been paid $31,462.03, and that for a period of at least five years, commencing with January 1, 1923, because of the ill repute which the property had acqured from the abuse of it by the War Department, the rental value has been reduced a total sum of not less than $448,000.00. It also was established that the sale value of the property, in 1919 or in 1922 was diminished as much as $600,000.00.

The proofs also show, and the Court of Claims has found (paragraph XIII, Rec. p. 7) that the other first-class hotels at Asheville were highly prosperous that spring, and that the Battery Park Hotel was comfortably filled, until the latter part of April, although steam-shoveling and other work were going on all around, preparatory to the demolition of the hotel itself, in order to make a site for business houses and a more modern hotel; that from lack of accommodations tourists were turned away from the two other hotels, some of them going even to the Kenilworth. As to the Kenilworth itself it was found by the court that, as against a capacity of 450 the average house count per day was 30 guests in March, 35 in April and 22 in May. It was established also that persons who had intended to go to the Kenilworth had gone elsewhere because they had heard it had housed tuberculosis and other contagious diseases, some even cancelling reservations made before they had heard of this fact. The manager appended to his disposition an

itemized statement of the Kenilworth's income and expense, allowing for rent $41,665.65, and showing an operating loss of $55,929.74, making a net operating loss, with no overhead charge, of $14,263.14. This poor result had followed the sending out of 70,000 circular letters before opening the house and advertising afterward through the leading agencies and sending out an expert hotel man to solicit business.

Appellant contends that it is entitled to recover the injury to its reversion as of November 8, 1919, unless that be shown to exceed the expense of thorough renovation plus rental value lost.

In the matter of renovation cost, for disinfection, there was in evidence an estimate of Mr. Dreyer, an architect. The War Department contract then had been liquidated two years before, in 1919, by readjustment of the term and the rent, and Mr. Dreyer was speaking of a matter that lay entirely outside the contract, viz., the infection of the building with disease germs and the necessity of tearing out the interior finish in order to remove those. The contract of 1919-1924 with the Public Health Service carried its own expense, viz., (1) rent and (2) repair, e. g., of broken window frames, door locks, stairway balustrades and any like items which could not be classed as wear-and-tear; and under the adjustment of November 10, 1922, claimant was compensated for those injuries and none other, leaving the matter of renovation, and its cost, to stand as it always had. The Court of Claims having ignored this matter, the motion for a remand in its items 13 and 14 asks that it be directed to make a finding thereon.

The Court of Claims has found that many patients of each class named in the contract for exclusion from

the hospital were treated there, but that in some cases the first step was a surgical operation and in others the banned diseases and others were treated concurrently, and that some diseases, "contagious" or "obnoxious" in the popular sense, were not truly banned. The findings and opinion of the court do not seem to travel the same route exactly but the combined effect is to decide that there was no violation of the contract. The court also decided that neither of the measures of damages stated herein applies and that there are no sufficient criteria for a compensatory judgment.

ASSIGNMENT OF ERROR

On the existing record, errors are assigned as below. It is assumed that they will be more manifest if the findings of fact are enlarged in the ways sought in appellant's motion.

The Court of Claims erred:

(1) In holding that the contract between the Surgeon General and appellant was not breached by the housing and treatment in the hospital of tubercular patients.

(2) In holding that said contract was not breached by the retention and treatment, in the hospital for tuberculosis of a patient on whom a surgical operation, as a part remedy for the same disease, had first been performed there.

(3) In holding that said contract was not breached by the retention in the hospital, first for observation and then for treatment, of a patient suffering with tuberculosis.

(4) In not holding that said contract was breached by the retention and treatment in the hospital for

tuberculosis of a person who was housed there for a surgical operation but on whom no operation was performed.

(5) In holding that said contract was not breached by the housing and treatment of patients for tuberculosis and a concurrent disease.

(6) In holding that said contract was not breached by the housing and treatment in the hospital of syphilitic or typhoid patients.

(7) In holding that said contract was not breached by the housing and treatment of patients for syphilis or typhoid fever and a concurrent disease.

(8) In not holding that said contract was breached by the housing in the hospital temporarily for any length of time whatever, awaiting removal to another hospital, of a person suffering with tuberculosis, on whom it was not intended to perform a surgical operation.

(9) In not holding that said contract was breached by the housing in the hospital temporarily for any length of time whatever, awaiting removal to another hospital, of a person suffering with tuberculosis on whom no surgical operation was performed.

(1) In rejecting, as measures of damage suffered by appellant, both the expense of remedying the same, by physical reconstruction and by lapse of time, and the diminution of the market price of the property.

(11) In not reversing the judgment of the Court of Claims.

LEGAL PROPOSITIONS AND AUTHORITIES

That a tenant, violating a covenant in his lease, is answerable to the lessor for any damage which re-

sults to the property, and that the Government, when a contractor, carries the same liabilities as any other contractor, are commonplaces of the law.

In the case of the *United States* v. *Bostwick*, 94 U. S. 53, relating to the Government's informal renting of a building "for the purposes of a hospital" or "for all purposes," the premises, as variously stated in the negotiations, had been used as a smallpox hospital. The court held that there was a presumption that the lessor expected that a hospital could be operated without restrictions, but that, in any event, the Government was protected by the stipulation "for all purposes." This, surely, implies that, if there had been a stipulation against smallpox or any other named diseases, the owner of the property would have been entitled to compensation for any injury done through those diseases.

In the Massachusetts case of *Delano* v. *Smith*, 206 Mass. 365, it was held that if a contagious hospital, rented under that description, were used for diseases which injured the reversion, this constituted waste and the owner would be entitled to recover the amount of the diminution in market value; the existence and extent of the injury being questions for the jury. In *Hersey* v. *Chapin et al.*, 162 Mass. 176, where a city Board of Health had taken premises without the owner's consent and used them as a smallpox hospital, it had been held that an action lay for any resulting diminution in the rental value. Proof was offered by the plaintiff that a few months after the health authorities surrendered the premises applicants who had offered to lease a part of them objected and withdrew when they heard that there had been smallpox in the building, and the appellate court held that this testi-

mony should have been admitted as bearing on the question of the market value at that time.

On the general question that a lessor is entitled to compensation from the lessee for any injury to the reversionary interest by any unlawful or forbidden act, the following cases are in point:

Higgins v. *Los Angeles Gas & Electric Co.*, 159 Calif. 651.
Cooper v. *Kankakee Electric Light Co.*, 164 Ill. App. 581.
Donk Bros. Coal & Coke Co. v. *Novero*, 135 Ill. App. 633.
Adams & Sullivan v. *Sengel*, 177 Ky. 535.
Toebbe v. *City of Covington*, 145 Ky. 763, quoting *Madisonville* v. *Hardman*, 29 Ky. Rep. 254.
C. N. O. & T. P. Ry. Co. v. *Falconer* (Ky. unofficial) 97 S. W. 729.
Wiggins v. *St. L., M. & S. E. Ry. Co.*, 119 Mo. App. 492.
Slavin v. *State*, 152 N. Y. 45.
Bigbee Fertilizer Co. v. *Scott*, 3 Ala. 333.
Roach v. *Blair*, 190 Mich. 11.
Barrick v. *Schifferdecker*, 132 N. Y. 52.
Graessle v. *Carpenter*, 70 Ia. 116.

The property concerned in *Higgins* v. *Los Angeles Gas & Electric Co.*, *sup.*, was rented from plaintiff by a stranger to the suit and used for a restaurant, and it was burned by a defect in the lighting company's plant. The building was two stories high and plaintiff rebuilt it one story high. In the suit he failed to make competent proof as to the expense of this partial reconstruction, but he proved how much rent he had lost to the end of the rental term, and a judgment for that was affirmed.

In *C. N. O. & T. P. Ry. Co.* v. *Falconer*, *sup.*, where the leased building had been burned, it was held that

the owner was entitled to recover what it would cost to reproduce it although there was no market then for such a building at that place.

In *Toebbe* v. *City of Covington, sup.*, the rule was laid down that in cases of temporary injuries to buildings the owner should recover the reasonable cost of repairing plus the depreciation in rental value during the term sued for, if he occupied the property himself, or the diminution in the value of its use if it were rented.

In principle the same as this latter is stated in Sutherland on Damages, Sec. 1018 (p. 3770) to wit, that if a trespass results in preventing the leasing of property the loss of rental value may be recovered in addition to the cost of repairing it. Obviously, there is the same right of action for a partial loss of rent as for entire loss.

To the same effect is Wood on Landlord and Tenant, Sec. 535 and notes, Second Edition, pp. 1276-1279.

A lessor, while the land is in possession of the tenant, may sue for a nuisance causing injury to the reversion though the nuisance itself may be but temporary. *Bigbee Fertilizer Co.* v. *Scott, sup.*

In *Toebbe* v. *City of Covington*, it was said that successive actions may be maintained by the lessor for a continuing nuisance caused by the lessee.

The owner of a leased building is entitled to recover the rents he lost from the destruction of the building by fire, during the time when he reasonably could have made repairs, notwithstanding that he did not make such repairs. *Higgins* v. *Los Angeles Gas & Electric Co., sup.*

If a defendant has been in possession several consecutive terms the delivery of each new lease by the landlord is not a waiver nor an estoppel of the right to claim damages previously sustained.

> *Sutherland on Damages,* Third Edition, Sec. 856, p. 2552.

The rule that where there has been an implied surrender of posession by acceptance of a new lease the landlord loses all rights dependent upon the continued existence and validity of the surrendered lease applies simply to such rights as can exist only when the lease continues; it does not extinguish rights of action already accrued.

> *McGregor* vs. *Board of Education,* 101 N. Y. 511.

In the light of the authorities above, of the findings made by the Court of Claims, and, to some extent, of facts hypothesized in the motion for a remand upon which there was no dispute, appellant's rights under its contract and injuries it has suffered will now be discussed.

The Contract

The Court of Claims, largely by reason of a change of verbiage made in the contract just before it was signed, concludes that appellant has no valid complaint against anything that was done in the administration thereof.

The first draft of the contract, or proposal, which was submitted to the Surgeon General by appellant's President under a letter dated December 17, 1918, said:

"(2) The building and property are to be leased to the Government for the purpose of a convalescent hospital for disabled officers or soldiers, but it is especially understood, and the lease shall so provide, that no part of the property shall be used for the purpose of treating or housing any person suffering from tuberculosis in any form, or from smallpox or any other contagious or obnoxious disease, provided, however, that this shall not apply to a person suffering from tuberculosis housed temporarily in said premises for an operation or the like."

The text of the substituted clause is as follows:

"(2) The building and property are to be leased to the Government for the purpose of a convalescent hospital for disabled officers and soldiers, but it is especially understood, and the lease shall so provide, that no part of the property shall be used for the purpose of receiving for treatment any person suffering from tuberculosis in any form, or from smallpox, or any other like contagious or obnoxious disease, provided, however, that this shall not apply to a person suffering from tuberculosis housed temporarily in said premises for the purpose of an operation or the like."

The Court of Claims regards the phrase "no part of the property shall be used for the purpose of receiving for treatment" as differing radically from "no part of the property shall be used for the purpose of treating or housing." This conclusion follows naturally enough from the assumptions (1), in the opinion (Rec. p. 38), that "the defendant refused to accept the restriction as proposed," and (2), in the findings, (P. 17), that the Government "objected to the use of the words 'of treating' in the restriction upon the use of the building." Appellant takes a different view of the contract

and says that the court's theories, as here stated, are in conflict with the sole evidence which it seeks by its motion to bring into the record. It admits that the second phrase used in the same sentence of the findings, viz: "suggested in lieu thereof" and—but nothing stronger—is correct.

Firstly, appellant submits that on the face of the restrictions there is no difference in their meaning except that the language adopted is slightly more accurate than that first employed. "Property" in each case is the subject of the restriction; while the thing inhibited was, the one case "treating or housing" and in the other case "receiving for treatment." A meticulous stylist, such as puts the last touch upon Government papers, would readily see the ineptitude of the word "treatment" to a building. "Treatment" is done by medicines, by watchful attention to the patient's body in all its functions, by physical exercise carefuliy limited, etc.; it is not done by a house. A house can do no more than receive and shelter a person. So in speaking of the functions of a house or "property" the correct term to employ was "receiving for treatment," not "treating."

Secondly, the proviso which limits the restriction is the same in both cases, viz. "that this [restriction] shall not apply to a person suffering from tuberculosis housed temporarily in said premises for the purpose of an operation or the like." If it were intended to permit (a) the retention of surgical patients, after reaction from the operations, and their treatment for tuberculosis, or (b) the retention for tuberculosis treatment of persons who at their entry were not supposed to have that disease, or (c) the concurrent treatment of tuberculosis and some other disease, would not some phrase have been inserted by the lynx-eyed offi-

cers of the Surgeon General's bureau to express the purpose?

In these observations the restrictive clauses are read by their four corners. The motion for a remand in its item 1 suggests that if the occasion and method of the change were known to this court the case would be clearer still. On another point, to wit: leasing for one year with optional renewals instead of five years, the Court of Claims has shown that the change involved considerable of elucidation and delay (Findings, pp. 17, 25-28). If there was no explanation by the Surgeon General's office and no delay in the re-writing of the restrictive clause—if nothing occurred beyond the suggestion of the change by the contracting quartermaster on one day and its acceptance without comment by appellant's President two days later—will not the conclusion follow irresistibly that the parties supposed they were making a change of form only, not of substance? If appellant was keen, when making its first offer to the Surgeon General, to safeguard the property and its reputation against "housing or treatment" of tubercular patients (Rec. pp. 3, 37), would it have consented a month later, without a word of protest, to the licensing of tuberculosis treatment in the building.

Suppose the officer in charge at Kenilworth (Motion, item 5) in answer to protests by appellant's President, admitted that he was violating the contract and pleaded the unexpected urgencies of the Government; is that a negligible fact?

Is it not more important still, if true, that officers in charge wrote to their superiors that they were housing and treating tubercular patients and that this was a breach of contract (Motion, items 2 and 3).

Finally, if the Secretary of the Treasury, when considering the taking over of this property for the Public Health Service, detailed an officer to making investigation, looking to the operation of a hospital, and this officer in his report pointed out that the army lease did not carry the "privilege of treating tubercular patients," would not this put a different light on the contract from that in which the Court of Claims has viewed it? (Motion, item 4.)

As regards syphilis and typhoid the Court of Claims decides that the contract gave the Medical Corps a free hand. The argument counts on the words, in the restrictive clause, "from smallpox, or any other like contagious or obnoxious disease." No other disease, says the court, except measles is so contagious as smallpox, and therefore syphilis and typhoid are not included in the words "like smallpox." The court refrains from asserting that these words were intended to include measles and nothing more; but it reads the restriction to mean "any person suffering from tuberculosis in any form, or from smallpox or from measles" (pp. 18, 22, 23).

In view of the fact that many syphilitic and typhoid patients, and nobody suffering from measles, was received and treated in this hospital, it seems to counsel for appellant that the Government, not appellant, should be "heard" upon this interpretation of the arrangements of the Medical Corps.

Breaches of the Contract

If the view, or views, which the Court of Claims takes of the administration of the Kenilworth hospital were correct and were sufficiently compensive, appellant, obviously, would have little room to say its rights

were invaded. Appellant *per contra* submits that some of the court's statements are not supported by any evidence in the record and that some of the most important facts, established by the entire and harmonious evidence (Motion, items 2, 5, 6) are ignored in the findings. But the court's conclusions as they stand are not so positive, in the denial of all actionable injury to appellant, as they might seem at a glance. The words "none of these patients was received in said hospital for treatment of tuberculosis" in finding (Rec. p. 21) are no more significent than the statement that some were taken in to be treated for tuberculosis and concurrent diseases and that some (fifty-nine) patients were found on observation to be suffering from tuberculosis; and these statements cannot be consdered fairly unless the court has those details which appellant's motion suggests. That tubercular patients were removed "as soon as practicable" and that "it was not the purpose or practice of the medical authorities having said hospital in charge to house tubercular patients therein otherwise than temporarily" are more conclusions, to be tested in this court by the real evidence for which the motion calls. "Temporarily." If the treatment continued until the medical authorities' occupancy of the property terminated, to-wit, on November 8, 1918, can it fairly be called "temporary." For the purpose of this contract it would seem to be as permanent as possible. Item 9 of the motion aims to produce the facts of this particular.

Besides, the contract did not give the Medical Corps any discretion and power to lodge and treat tubercular patients in the hospital for any reason, though temporary, which might appeal to their medical or military judgment. Except for surgical operations and for

such recuperation therefrom as would permit travel by the patients, it closed the doors of the hospital against all persons known at the outset, or discovered later, to be suffering from tuberculosis.

In comparing this case with *Hersey* v. *Chapin*, 162 Mass. 176, and *Delano* v. *Smith*, 206 Mass. 365, the Court of Claims says:

> "A tenant in possession of a dwelling house under a lease is assuredly obligated, as these cases hold, to refrain from subletting the premises for use as a smallpox hospital—a pesthouse—to the injury of the reversion. The distinction, a very important one, between the cases cited and the issue here is that the owner of the premises, the owner of the reversion, let the premises as an original proposition for use as a hospital. By its own lease the plaintiff contemplated the incidental injury to the reversion arising from mere use and occupation, if any such occurred, and is presumed to compensate itself therefor in the fixed rental. The issue here is a direct contractual relationship between the owner of the premises and the tenant, and an allegation of breach of the same."

What possible difference of legal right and wrong can there be between abuse of a hotel and abuse of any other building? In this case the lessor anticipated a possible abuse of the hotel, in the administration of the contract, and took pains at the outset to protect itself therefrom. Claimant did not contemplate, and fix his rental price for, any incidental injury to the reversion except breakage and other like deterioration; and for this and nothing more it was afterward paid through findings of an army claims board.

What claimant "contemplated" in relation to tuberculosis, smallpox and other contagious diseases—

its horror of these agents of destruction—appears too clearly for question from its offer, as below, to the Surgeon General set out at page 18 of the record.

> "*Restriction against tuberculosis.*" "The restriction in the use of the property against the housing or treatment of patients suffering from tuberculosis, is from our standpoint as the owners and future operators of the hotel, necessary, as such a use would forever destroy the property for the purpose for which it was constructed. The question of our ability, under proper medical advice, to renovate and disinfect the premises, thereby removing all danger of infection, does not arise —the danger of infection could no doubt be altogether removed, but it would cost us a fortune in advertising to convince the traveling public of this fact, and even with such an expenditure there would be no assurance of success in the undertaking. The same applies with equal and even more force to other contagious diseases of the character of smallpox, etc."

One hope of appellant (Motion, item 5) in seeking a remand to the Court of Claims is to show that from the outset appellant protested that the Medical Corps, in harboring tubercular and syphilitic persons for other purpose than surgery, was inflicting an injury on its property in excess of any that could follow from the uses authorized by the contract.

The Court of Claims at some places in the findings and opinion has used very positive words and at other places has qualified those by other words; and in some instances words, or phrases, contradictory of each other have been used at different places. But, on a fair summing up of all that is said, the court's conclusions are as follows:

That the contract was not violated unless a person known to be suffering with tuberculosis or syphilis was taken into the hospital to be treated, and was treated for one of the diseases, without surgery and without treatment for or observation of any other malady; that when a surgical operation had been performed and its own effects were healed, or after an intention of operating had been abandoned, treatment for tuberculosis or syphilis was permissible; that a person receiving treatment for tuberculosis concurrently with some other disease was not a "tubercular" patient; that syphilis, except in an advanced stage, was not banned by the contract and that the court does not know as to any of the patients housed and treated whether this disease existed in its tertiary form.

We do not believe that any such version of the contract will bear the scrutiny of this court.

The Court of Claims, while distinguishing early stages and advanced stages of syphilis—holding the latter alone to be within the contract restriction—does not find whether, among the patients who were housed and treated in this hospital, any had syphilis in what is popularly known as the advanced stage, viz: the tertiary. Seeing that, upon an affirmative finding in this particular, it could not be questioned that the contract was violated, it is obvious that some finding should be made, and this is sought by item 8 of the motion for a remand.

The Court of Claims, while not treating very thoroughly of appellant's injury, rather makes light of the unprofitable patronage which the Kenilworth hotel, from its opening in February, 1924, until the institution of the second suit, received. The facts that an insurance convention of 90 persons was entertained for six days in March and a medical society of 92 persons,

five days in April, seem to be regarded as more important than the average of the entire trade, viz: 30 in March, 35 in April, 22 in May and 20 in June .

The relation of these two large bodies of patrons in two months to the general average for the months is not considered. Thirty patrons a day for thirty-one days, means 930 as a month's total; but 90 insurance men for 6 days means 540 days' business, an average for the remaining 24 days of the month of 20 persons; and 92 physicians for 5 days means 460 days' business, leaving for the remaining 25 days of the month a total of 590 persons, averaging 23 persons per day. So it is evident that during March, with the exception of the days named, there were only about 20 persons in the house and in April, with the exception of the 5 days named, only a little more than 23 persons.

Measure of Damages

The injury of which this suit complains matured when the lease of the Medical Corps was terminated by agreement and the Public Health Service took the property over. It consisted of two items, (1) the expense of so renovating the building that no factors of disease infection would remain, and (2) the diminution, *i. e.*, destruction *pro tanto* of the property's rental value for a time to follow upon the removal of the noxious patients. The amount of the first of these could have been ascertained instantly by a competent architect; while it was equally appropriate for the owner of the property, if it chose to take the risk and not wait for actual demonstration, to prove forthwith by experts in the two fields, the length of time required for the property to live down its bad reputation and the loss of rental value that would occur during that

period. Another measure of the damage, if not in excess of that indicated, was the reduction of the property's sale value.

Probably it is not out of place to say that the full proof, covering this alternative, was made before the case was submitted to the Court of Claims. Of course, the allowance of either amount, or of any amount whatever, was a moot question when the Court of Claims had reached the conclusion that appellant had no right of action. All that the court has said in this connection is its finding IX (Rec. p. 23) as follows:

> "The occupancy of the Kenilworth Inn by the Government as a general hospital, excluding therefrom patients with tuberculosis and other contagious or obnoxious diseases, would have reduced the rental value of the property as a hotel after its surrender by $50,000 per annum. What further reduction, if any, in rental value was caused by the housing and treatment of patients suffering from tuberculosis, typhoid, or venereal diseases does not satisfactorily appear from the evidence."

Obviously, injury to the property (if proved) by uses which did not violate the contract, has no pertinence to this suit. If the contract *was* violated, proof, in the alternative above, is necessary before a judgment can be entered. The purpose of items 12 and 13 in appellant's present motion is to bring the facts into the record.

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JUNIUS G. ADAMS,
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INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions involved	1
Statement of facts	2
Appellant's motion to remand	2–10
Summary of argument	10–12
Argument:	13
I. THE WAR DEPARTMENT DID NOT VIOLATE THE RESTRICTIVE COVENANT	13–18
II. THE APPELLANT FAILED TO ESTABLISH EITHER THAT IT HAD BEEN DAMAGED OR THE EXTENT TO WHICH IT HAD BEEN DAMAGED BY THE ALLEGED BREACH BY THE WAR DEPARTMENT OF THE RESTRICTIVE COVENANT	18–28
Conclusion	28

AUTHORITIES CITED

Cramp v. *United States*, 239 U. S. 221	16
Delano v. *Smith*, 206 Mass. 365	28
Hathaway & Co. v. *United States*, 249 U. S. 460	16
Hersey v. *Chapin*, 162 Mass. 176	28
Robinson v. *United States*, 261 U. S. 486	16
Rogers v. *United States*, — U. S. (decided Mar. 1, 1926)	11
Towar Cotton Mills, Inc., v. *United States*, — U. S. (decided Mar. 1, 1926)	18
Union Pacific Railway Co. v. *United States*, 116 U. S. 154	16
United States v. *Anciens Etablissements*, 224 U. S. 309	11, 16
United States v. *Driscoll*, 131 U. S. CLIX	11
United States v. *New York Indians*, 173 U. S. 464	11
United States v. *Omaha Indians*, 253 U. S. 275	16
United States v. *Smith*, 94 U. S. 214	21
Weaver v. *The Palmer Brothers Co.*, — U. S. (decided Mar. 8, 1926)	19

In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 240

THE KENILWORTH COMPANY, APPELLANT

v.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims appears at pages 37 to 42, inclusive, of the record, and is reported in 59 Ct. Clms. 156.

JURISDICTION

The judgment to be reviewed was entered January 21, 1924 (R. 16, 43). On March 21 a motion for new trial was seasonably made and entertained, and on May 12, 1924, was overruled (R. 43). Petition for appeal was filed August 9, 1924 (R. 43), under Section 242 of the Judicial Code, as it existed prior to the Act of February 13, 1925.

THE QUESTIONS INVOLVED

The appellant seeks to recover damages for the alleged breach of a restrictive covenant contained in a lease with the War Department. The questions raised by this appeal are whether the Court of Claims correctly decided (1) that the War Department did not violate the restrictive covenant and (2) that in any event the appellant failed to prove either that it had been damaged or the extent to which it had been damaged by the alleged breach. Both are questions of fact, and it is difficult to discover any question of law which is raised by this appeal, except, possibly, the question of the proper construction of the restrictive covenant.

The appellant's statement of facts is not satisfactory. Not only has the appellant gone outside the record to give its version of the evidence, but it has failed to state essential facts found by the Court of Claims, and has incorrectly stated other essential facts found by that court. The Government therefore finds it necessary to state the facts rather fully.

STATEMENT OF FACTS

On December 11, 1917, the appellant was the owner of a tract of land near Asheville, North Carolina, on which it had a large hotel under construction (R. 17). On that day it offered to lease the property to the War Department as a hospital for disabled soldiers, for a term to continue until a year after the signing of a treaty of peace (R. 25).

The appellant stipulated that the lease should provide that no part of the property should be used " for the purpose of *treating or housing* any person suffering from tuberculosis in any form, or from smallpox or any other *like* contagious or obnoxious disease, *provided, however*, that this shall not apply to a person suffering from tuberculosis housed temporarily in said premises for an operation *or the like* " (R. 26). (Italics ours.)

However, the War Department objected to the wording of the proposed restriction (R. 17, 29), and the appellant accordingly revised its offer by substituting for the words " for the purpose of treating or housing " the words " for the purpose of *receiving for treatment*," with the result that the restrictive covenant finally embodied in the lease, dated January 21, 1918, between the appellant and the War Department, took the following form (R. 19):

> That the building and property are leased to the Government for the purpose of a convalescent hospital for disabled officers and soldiers, but it is especially understood that no part of the property shall be used for the purpose of *receiving for treatment* any person suffering from tuberculosis in any form, or from smallpox or any other *like* contagious or obnoxious disease, *provided, however*, that this shall not apply to a person suffering from tuberculosis housed temporarily in said premises for the purpose of an operation *or the like*. (Italics ours.)

The lease also obligated the War Department to surrender all buildings, equipment, and machinery "in as good condition and repair as when leased, usual wear and tear and acts of God excepted" (R. 19).

The term of the lease was to begin on February 1, 1918, and to end on June 30, 1918 (R. 19), but the lease was twice renewed. The Medical Corps of the Army occupied the hotel as a hospital for nineteen months, from April 9, 1918, when it was finally completed (R. 19), until November 8, 1919, when the second renewal lease was canceled by mutual consent under the circumstances hereinafter narrated (R. 20; *infra*, p. 6).

During the War Department's occupancy of the hotel, the appellant made repeated protests against the housing and treatment of tubercular and syphilitic patients (R. 23), and on August 2, 1921, presented a petition to the Secretary of War asking (1) for damages to the hotel in the sum of $158,721.32, and (2) for damages resulting from alleged breaches of the restrictive covenant in the sum of $500,000 (R. 23). On October 26, 1921, the War Department Claims Board awarded the appellant $70,359.54 in full settlement "*of all present and future claims for damages to said hotel property growing out of its use by the War Department,*" and rejected the appellant's second claim without prejudice (R. 24). On October 27, 1921, the appellant received the sum of $70,359.54 as payment in full for all damages to its hotel building (R. 24).

The appellant subsequently began this action (R. 1), in which it alleged (R. 4) that in violation of the restrictive covenant above set forth, the War Department "received and housed for prolonged treatment in said building a great number of persons suffering from tuberculosis and contagious and obnoxious diseases, and kept and maintained said persons in said building in large numbers and for prolonged periods * * *," and (R. 5) "housed and treated in said building a large number of German interned prisoners, who were at the time suffering with a malignant type of typhoid fever * * *."

The appellant further alleged that as a result, the reputation of its hotel as a tuberculosis hospital "was during the years 1918 and 1919 firmly established with the traveling and pleasure-seeking public," and that "by reason of said damage to its reputation, the rental value of said property now is, and for the five years following after December 31, 1922, will be $80,000 per annum less than it would have been but for such injury" (R. 7). The appellant also alleged that the cost of restoring the hotel to the condition in which the War Department received it "by fumigation, tearing out and replacing of interior walls, plaster, decorations, plumbing and equipment, would have been $325,000" (R. 7). By some mathematical process which we do not understand the appellant

fixed its total damage first at $600,000 (R. 8) and subsequently, by amendment, at $865,000 (R. 16).

The significance of the appellant's selection of December 31, 1922, as the date from which to reckon its alleged loss resulting from the diminished rental value of its hotel, is to be found in the circumstances under which the War Department's lease was terminated. On November 1, 1919, while the War Department's lease was still in force, the appellant proposed to the Secretary of the Treasury to lease the hotel and certain other property to the Government for hospital purposes for a term of five years from November 8, 1919 (R. 20), and on that day the War Department transferred the property to the Public Health Service of the Treasury (R. 20). On November 19, 1919, the appellant and the Treasury Department entered into a lease in accordance with the appellant's proposal of November 1, 1919. *Neither the proposal nor the lease contained any restriction whatsoever against the use of the hotel for the treatment of tubercular patients or those suffering from other contagious or obnoxious diseases* (R. 21). The Public Health Service used the property for hospital purposes for more than three years, from November 8, 1919, until December 31, 1922 (R. 24), when the Treasury Department's lease was canceled by mutual consent, *and during that period patients suffering from pulmonary tuberculosis were housed and treated in the hotel* (R. 21). Upon the termination of the Treasury Department's lease,

the appellant proceeded to furnish and equip the hotel at a cost of $161,875.21, and on March 10, 1923, opened it for the reception of guests (R. 24). The appellant went to no expense as far as appears from the record for "fumigation, tearing out and replacing of interior walls, plaster, decorations, plumbing, and equipment."

The findings of the Court of Claims make it perfectly clear that the War Department did not violate the restrictive covenant but, on the contrary, scrupulously observed its obligations thereunder.

During the nineteen months of the War Department's occupancy of the hotel as a hospital, the Medical Department kept certain records at the hospital, known as "Disease Index, Medical Cards," there being a card for each patient admitted to the hospital. These cards were evidently made up at the time the patient was admitted to the hospital and largely on the basis of information furnished by him. On one hundred and nineteen of those cards appears the word "tuberculosis." (R. 21.) *However, none of those patients was received for the treatment of tuberculosis.* (R. 21.) Sixty of them were discovered after observation and diagnosis to be free from tuberculosis, and the others were received for operations, or for the treament of other diseases, or for both purposes, or for observation. As soon as practicable those who were in fact suffering from tuberculosis were transferred to a tuberculosis hos-

pital. It was neither the purpose nor the practice of the War Department to house tubercular patients in the hospital except temporarily. (R. 21.)

The War Department maintained a venereal ward in the hospital and fifty-five cases of suspected syphilis or gonorrhea are recorded as having been admitted to the hospital during the period of the War Department's occupancy. However, of these patients, nineteen were discovered on diagnosis to have no venereal disease; fifteen required an operation or the treatment of a concomitant disease; and three were admitted for other diseases and developed venereal diseases thereafter. (R. 22.) Of the entire fifty-five cases only seventeen showed venereal conditions not requiring operations and not accompanied by other diseases. Of these seventeen cases, seven were members of the hospital organization. Of the remaining ten cases, three were from a labor organization working in a near-by forest, who walked from their place of work to the hospital; four became ill near the hospital and presented themselvese for treatment, and three were transferred to the hospital without authority under the War Department's regulations. The patients afflicted with venereal diseases were coming to and from the hospital all the time. (R. 22.)

In the latter part of the summer of 1918, one hundred and ninety interned Germans, suffering from typhoid fever in an acute stage, were transferred to the hospital. Four of them died en route

and seven of them after their admission to the hospital (R. 22).

No violations of the lease in other respects are charged.

After hearing medical testimony, the Court of Claims found (R. 22, 23):

> 1. That typhoid is not contagious and that the average case of typhoid is not obnoxious. (There is nothing in the record to indicate that the typhoid cases admitted to the hospital were not average cases. As a matter of fact the indications are that they were, since only eleven of the one hundred and ninety cases terminated fatally.)
>
> 2. That syphilis is contagious, but as a practical matter may be communicated only by sexual intercourse, and that it is not obnoxious except in its secondary and tertiary stages. (The record does not disclose that any of the syphilitic cases had advanced beyond the primary stage. If it had been proved that they had, it is inconceivable that the Court of Claims would not have so found. In effect it found to the contrary by finding that the treatment of the syphilitic patients did not constitute a breach of the restrictive covenant.)
>
> 3. That smallpox is the most contagious of diseases, except measles, and may be communicated at a distance of several feet; that it is also an obnoxious disease and that during the pustular stage it is a revolting sight, disagreeable to the eye, to the sense of smell and most objectionable in every way.

4. That the organisms of syphilis and typhoid, unlike those of tuberculosis, die very quickly and leave no traces on floors or walls.

5. That neither syphilis nor typhoid is contagious like smallpox or tuberculosis.

The Court of Claims also found (R. 23) that the rental value of the appellant's hotel as a hotel would have been diminished $50,000 per annum by its occupancy by the War Department as a general hospital, even though all patients with tuberculosis and other contagious or obnoxious diseases had been excluded therefrom, and that what further reduction, if any, in rental value was caused by the housing and treatment of the patients suffering with tuberculosis, typhoid or venereal diseases did not satisfactorily appear from the evidence.

THE APPELLANT'S MOTION TO REMAND

The appellant apparently recognizes that it has no chance to succeed upon this appeal in view of the facts as found by the Court of Claims. It admits that "if the view, or views, which the Court of Claims takes of the administration of the Kenilworth hospital were correct and sufficiently comprehensive, appellant obviously would have little room to say its rights were invaded." (Brief, p. 14.) The appellant has therefore moved this Court to remand the case for not less than seventeen further findings. The motion to remand has as little merit as the appeal. It is based upon the contention that the Court of Claims failed to find "important facts" and that other findings are without supporting evidence (Appts. motion, p. 1). However,

in neither respect has the appellant's contention any foundation in the record, and this Court will not go beyond the record to determine whether a case should be remanded for further findings of fact. *United States* v. *Anciens Etablissements*, 224 U. S. 309; *United States* v. *Driscoll*, 131 U. S. CLIX; *United States* v. *New York Indians*, 173 U. S. 464. There is nothing in this case to take it out of the general rule that the findings of the Court of Claims are conclusive upon this Court. As this Court said in *Rogers* v. *United States* (decided March 1, 1926):

> Much of the briefs of counsel for the plaintiff in error is made up of statements based on and quotations from the evidence before the Court of Claims. We can not consider this. We are limited to the findings of the Court of Claims.

A brief consideration of the further findings which the appellant desires will show that the motion to remand is entirely without merit. In many instances the appellant seeks, not ultimate facts, but evidence, and often immaterial evidence. (See requests 1, 2, 3, 4, 5, 7, 10, 11, and 17.) In the instances in which the appellant asks for findings of fact the facts are either entirely irrelevant (see requests 9, 12, 14, and 15) or are fully covered by the findings contained in the record. (Compare the second, sixth, and ninth requests with the fifth sixth, and seventh findings of fact [R. 21, 22], the fifth request with the eleventh finding of fact [R. 23], the tenth request with the fourteenth find-

ing of fact [R. 24, 25], and the seventh, thirteenth, and sixteenth requests with the ninth finding of fact [R. 23]. As far as the eleventh request is concerned, the Court of Claims has said that " there is nothing in the record to show that any (guests) have departed or others failed to come because of the previous use of the building as a hospital." (R. 41.)

If further proof of the frivolous character of the appellant's motion to remand is necessary, it is to be found in the appendices thereto, the purpose of which is to show this Court " the probability that the matters here indicated can be proved " (Appts. motion, p. 4). Thus, in its first request for further findings, the appellant asks for evidence, namely, the full correspondence or other negotiations between the Office of the Surgeon General and the appellant leading up to the final agreement upon the wording of the restrictive covenant (Appts. motion, p. 2). Appendix A (Appts. motion, pp. 7–14) is supposed to support that request, but Appendix A consists of certain correspondence, every bit of which is now included in the record (pp. 26, 27, 29).

The real purpose of appellant's motion is not to obtain additional findings of ultimate facts, but to obtain a new trial. That is disclosed by the fact that the appellant seeks an opportunity to introduce further evidence in the event the case is remanded for further findings (Appts. motion, p. 5).

SUMMARY OF ARGUMENT

I. The War Department did not violate the restrictive covenant.

II. The appellant failed to establish either that it had been damaged or the extent to which it had been damaged by the alleged breach of the restrictive covenant.

ARGUMENT

I

THE WAR DEPARTMENT DID NOT VIOLATE THE RESTRICTIVE COVENANT

The extent to which the lease restricted the War Department's right to use the hotel as a hospital is made perfectly clear when the language of the restrictive covenant (*supra*, p. 3) is considered in the light of the negotiations preceding the execution of the lease. The appellant first proposed that the lease should prohibit the *treatment or housing* of patients with tuberculosis, smallpox, or *like* contagious or obnoxious diseases, except that they might be housed in the hospital temporarily for an operation *or the like* (R. 17). But the War Department was unwilling to put itself in a position in which it might have to violate either the obligations of its contract or the obligations of humanity.

It realized that however careful it might be, patients suffering from the prohibited diseases might gain admission to the hospital. It realized that patients admitted to the hospital for other diseases might subsequently develop one of the pro-

hibited diseases. It knew that in either of those contingencies it might be necessary to house and treat patients with the prohibited diseases until they could be removed to another hospital. It realized that if a patient with one of the prohibited diseases was admitted for the surgical or medical treatment of a concurrent disease, as he might properly be admitted under the appellant's proposal, which provided for their admission " for an operation *or the like*," the War Department could not fail simultaneously to treat the prohibited disease. It realized that it would do little good to amputate a tubercular patient's leg to save him from death from gangrene only to permit him to die from tuberculosis.

The War Department was therefore unwilling to assume an absolute obligation *not to treat or house* patients with the prohibited diseases, except temporarily and for other diseases. The War Department therefore insisted or, as the appellant would have it (Appts. brief, p. 5), " suggested " that the proposed restrictive covenant should be modified so as to impose upon it only the obligation not to receive persons with the prohibited diseases for the treatment of those diseases (R. 18). In spite of the appellant's argument to the contrary (Brief, p. 12), there was obviously a radical difference between the appellant's proposal and the War Department's counter proposal, and the appellant agreed to modify the restrictive covenant

in accordance with the War Department's wishes. The resulting obligation is clear. The War Department agreed in effect (1) that it would not receive a patient with one of the prohibited diseases, solely for the purpose of treating the prohibited disease, and (2) that having received a patient with one of the prohibited diseases for the surgical or medical treatment of a concurrent disease, or for observation, it would keep him in the hospital no longer than reasonably necessary for that purpose. The Court of Claims correctly construed the restrictive covenant (R. 41):

> What do the words "receiving for treatment" mean? It is not asserted that they import absolute exclusion. Their ordinary and usual meaning indicate a clear intent to impose upon the defendant the positive obligation to refrain from knowingly receiving a patient within the restricted class and thereafter treating him for the disease. In other words, in so far as it was possible, by every known medical means, the defendant would not receive for treatment a patient known at the time to fall within the restriction. Manifestly, though such a patient might be received temporarily, he could not be immediately and ruthlessly cast aside, and if immediately thereafter he was transferred to a regular tubercular hospital for treatment, no promises were broken.

It is obvious that the appellant has not correctly stated (Brief, p. 18) the construction placed upon the restrictive covenant by the Court of Claims.

The War Department did not violate the restrictive covenant. No tubercular patient was admitted to the hospital except for the surgical or medical treatment of other diseases or for observation. The restrictive covenant permitted their admission for such purposes. As soon as practicable they were transferred to a tubercular hospital. It was neither the purpose nor the practice of the War Department to house tubercular patients in the hospital, except temporarily.

While all of the typhoid patients and seventeen of the venereal patients were admitted to the hospital solely for the treatment of those diseases, that was not a breach of the restrictive covenant for the simple reason that the restrictive covenant had no application to any disease except tuberculosis or smallpox and *similar* contagious or obnoxious diseases. The Court of Claims has found that neither typhoid nor syphilis falls within that category. A finding with respect to the similarity between diseases, like findings with respect to the reasonableness of compensation or of delays, or with respect to the suitability of a building for the purposes for which it was intended, is a finding of fact conclusive upon this Court. *Robinson* v. *United States*, 261 U. S. 486; *Cramp* v. *United States*, 239 U. S. 221; *United States* v. *Anciens Etablissements, supra; Union Pacific Railway Company* v. *United States*, 116 U. S. 154; *Hathaway & Company* v. *United States*, 249 U. S. 460; *United States* v. *Omaha Indians*, 253 U. S. 275.

The appellant admits (Brief, p. 17) that under the restrictive covenant the War Department had the right to treat tubercular and syphilitic patients surgically, but argues that it had no right to take them into the hospital for the medical treatment or observation of a concurrent disease (Brief, p. 15). The appellant ignores the fact that the restrictive covenant provided that such patients might be housed temporarily for an operation *or the like*. Obviously, the purpose of this provision was to enable the War Department to afford general hospital facilities, not available in hospitals used exclusively for the treatment of the prohibited diseases, to patients suffering from such diseases.

The appellant complains that the Court of Claims did not find whether any of the syphilitic cases had advanced to the tertiary stage and argues that if any of them had advanced to that stage the restrictive covenant was violated (Brief, p. 18). That, of course, is a *non sequitur*. Assuming that the admission to the hospital of a patient with syphilis in the tertiary stage *solely* for the purpose of treating that disease, was prohibited by the restrictive covenant, even the appellant admits, as we have pointed out, that such a patient might have been admitted for the surgical treatment of a concurrent disease. Furthermore, the appellant alleges that its damages resulted from the fact that its hotel acquired the reputation of a tuberculosis hospital because of the use made of it by the War Department. Obvi-

ously, the hotel could not have acquired such a reputation as the result of the treatment of any number of syphilitic cases, even were they all in the tertiary stage. Besides, as we will point out later, the appellant did not prove what damage, if any, it suffered because of the treatment of the syphilitic cases. We may apply to the appellant's contention in this respect the language used by this Court with respect to the contentions of the appellant in *Tower Cotton Mills, Inc.*, v. *United States* (decided March 1, 1926):

> It is unnecessary for us to consider these contentions; for there are no findings by the Court of Claims that appellant suffered any loss or damage * * *.

II

THE APPELLANT FAILED TO ESTABLISH EITHER THAT IT HAD BEEN DAMAGED OR THE EXTENT TO WHICH IT HAD BEEN DAMAGED BY THE ALLEGED BREACH BY THE WAR DEPARTMENT OF THE RESTRICTIVE COVENANT

The appellant not only failed to prove a breach of the restrictive covenant, but also failed to prove that it suffered any damage as a proximate result. The appellant alleged that because of the treatment by the War Department of persons suffering from tuberculosis and other contagious or obnoxious diseases the rental value of the property for the five years succeeding December 31, 1922 (the date when the Public Health Service ceased to occupy the hotel for hospital purposes), " will be $80,000 per annum less than it would have been but

for such injury," and that the cost of restoring the property to the condition in which the War Department received it "by fumigation, tearing out and replacing of interior walls, plaster, decorations, plumbing, and equipment, would have been $325,000." (R. 7.)

The appellant argues (Brief, p. 3) that the expenditure of $325,000 was necessary "to clear away all seeds" of the prohibited diseases remaining in the hospital on December 31, 1922. However, the hotel was opened to the public without any such expenditure, which is rather conclusive proof that no such expenditure was in fact necessary. Furthermore, since the Treasury Department's lease did not limit the diseases which might be treated during the Public Health Service's occupancy of the hotel, the Government is obviously not chargeable with the cost of disinfecting against germs which were introduced into the hotel after November 8, 1919, when the War Department ceased to occupy the property and the Public Health Service took it over. On any theory the Government is chargable only with the expense of disinfecting against bacteria which took up their sojourn in the hotel prior to November 8, 1919. The appellant therefore endows bacteria with long lives. As this Court said in *Weaver* v. *The Palmer Brothers Company* (decided March 8, 1926: "* * * bacteria perish rapidly when separated from human or animal organisms * * *." Furthermore, it might be rather diffi-

cult, as a practical matter, even for the "competent architect" to whom the appellant refers (Brief, p. 19), to tell which of the germs remaining in the hotel on December 31, 1922, had been there since November 8, 1919, or what part of the expenditure of $325,000 was necessitated by those germs and what part by the germs which for more than three years the Public Health Service was permitted to bring into the hotel.

However, as far as this item of alleged damage is concerned, it is necessary to say only that on October 27, 1921, the appellant was paid and accepted $70,359.54 "as full, final and complete satisfaction of all present and future claims for damages to said hotel property, growing out of its use by the War Department" (R. 23, 24). The settlement was not confined, as the appellant contends (Brief, p. 16), to "breakage or like deterioration." The settlement has therefore left open only the claim that by reason of the alleged breach of the restrictive covenant, the rental value of the hotel was diminished for a period of five years succeeding December 31, 1922.

As to that, the Court of Claims has found that the occupancy of the hotel as a hospital by the War Department, although all persons with tuberculosis and other contagious or obnoxious diseases had been excluded therefrom, would have reduced its rental value as a hotel $50,000 per annum, and that the appellant did not prove "what further reduction, if any, in rental value

was caused by the housing and treatment of patients suffering from tuberculosis, typhoid, or venereal diseases * * *" (R. 23). That finding is conclusive. As this Court said in *United States* v. *Smith*, 94 U. S. 214, 219:

> In the estimation of damages the Court of Claims occupies the position of a jury under like circumstances. Damages must be proved. The court is not permitted to guess any more than a jury, but, like a jury, it must make its estimates from the proof submitted. The result of the best judgment of the triers is all that the parties have any right to expect.

A brief consideration of the facts will show that the Court of Claims was obviously right in its finding that the appellant failed to prove its damages.

The city of Asheville is attractive to two classes of persons—those seeking rest and recreation and those seeking a cure from tuberculosis. Experience has shown the necessity of segregating the two classes in order to prevent serious impairment of the city's reputation as a pleasure resort. The city has therefore adopted stringent laws and regulations to insure the complete isolation of persons with tuberculosis from the rest of its inhabitants, permanent and temporary (R. 38). If a building is let for the use of tubercular persons, its value for other purposes may be seriously impaired (R. 38). This is especially true of a hotel of the character of the appellant's, which is alleged (R. 2) to have

been " designed and constructed solely for the entertainment of persons, having ample means, who traveled and patronized hotels of the best class, for pleasure and luxurious living."

The appellant was fully aware of all this. The appellant knew that tourists, for sentimental reasons, might hesitate to stay at its hotel with knowledge that it had been used as a hospital for tubercular patients. (R. 18.) And yet under the terms of the appellant's original proposal to lease its property to the War Department as a hospital, persons with tuberculosis were permitted to be housed therein temporarily for an operation or the like (R. 17), and by the terms of the restrictive covenant as finally agreed upon, the War Department had even greater freedom in the treatment of tubercular patients (*supra*, p. 14). The War Department did not seek the lease. As the Court of Claims points out (R. 39), it was the appellant's voluntary act which changed the hotel into a hospital, thereby impairing its rental value as a hotel at least $50,000 a year, without regard to the kind of diseases to be treated therein. The reason for the appellant's conduct is not far to seek or difficult to find.

In December, 1917, the duration of the war was uncertain. The appellant undoubtedly shared the common belief that it would last for several years. The appellant undoubtedly believed that the possibility of profit in war times from so nonessential an enterprise as its hotel was highly specu-

lative, to say the least. The appellant much preferred the certain profit which would result from leasing a hotel that had cost $815,000 and in which its investment was only $105,000 (R. 17), at $115,000 for the first year and at $75,000 for subsequent years. (R. 28.) The conclusion is irresistible that the appellant's desire for present gain was far greater than its fear of future loss. It should not now be permitted to saddle on the Government a loss of which it deliberately took the risk.

The appellant's complaint is that its hotel acquired the reputation of a tuberculosis hospital as the result of its occupancy by the War Department. (R. 7.) The Court of Claims did not so find. However, it might well have acquired such a reputation had no tubercular patients been admitted to the hospital, for the terms of the restrictive covenant could hardly have been expected to become a matter of common knowledge. It might well have acquired such a reputation since the War Department had the right to house and treat persons with tuberculosis, provided only that it did not take them in for that purpose alone. The appellant's hotel might well have become known as a tuberculosis hospital as the result of the admission thereto of the fifty-nine tubercular patients to whose admission the appellant consented in advance. The hotel could hardly become known as a tuberculosis hospital as the result of the admission thereto of the typhoid and venereal patients.

The situation disclosed by the record is therefore this: The rental value of the hotel would have been diminished $50,000 a year solely by its use as a hospital and without regard to the character of the diseases treated therein. To what extent, if any, its rental value was further diminished by the fact that in nineteen months fifty-nine tubercular patients, one hundred and eighty-six typhoid patients and thirty-six patients with venereal diseases were treated in the hospital, does not appear. Nor does it appear to what extent such further diminution in rental value, if any, is to be attributed to the fifty-nine tubercular patients and to the nineteen patients with venereal diseases who were suffering with concurrent diseases, and to what extent to the one hundred and eighty-six typhoid patients and to the seventeen patients with venereal diseases who had no concurrent diseases.

That is not all. If the War Department caused the appellant damage, the appellant made no effort at mitigation. On the contrary, upon the termination of the War Department's lease and on November 8, 1919, the appellant leased the property to the Treasury Department for five years for hospital purposes (R. 20). The lease contained no restriction whatever upon the use of the hotel for the treatment of tubercular or smallpox patients or patients with other contagious or obnoxious diseases. The Public Health Service used the property as a hospital from November 18, 1919, to December 31, 1922 (R. 24), and during that period

patients suffering from pulmonary tuberculosis were housed and treated therein (R. 21). Undoubtedly this was not without its effect upon the reputation of appellant's hotel, but to what extent its diminished rental value is to be attributed to the War Department's use of the premises, and to what extent to the Public Health Service's, does not appear, and obviously was not susceptible of proof.

But even that is not all. When the appellant's hotel was first leased to the Government for hospital purposes, it was in an unfinished condition. It had never been used as a hotel. It was a new, untried, and highly speculative enterprise. There is nothing in the record to indicate its rental value as a hotel at any time, either in January, 1918, when it was rented to the War Department, or in November, 1919, when it was rented to the Treasury Department, or on December 31, 1922, when the Government ceased to occupy the property, or thereafter. As the Court of Claims said (R. 40):

> If, then, the plaintiff company, for a period of practically five years, demised its premises for use as a hospital, part of the time with a limited restrictive clause, and for much the greater portion of the time without any restriction, how may we estimate with any degree of certainty an alleged damage to its reputation or use as an inn, when, as a matter of fact, it had never attained any reputation or been used as such.

It appears from the record only that after expending $161,875.21 for furnishings and equipment, and nothing for disinfection, the appellant opened its hotel to the public on March 10, 1923 (R. 24), and that to June 1, 1923, its operating loss was only $9,741.72, after allowing for rent at the same rate paid by the Treasury Department, namely, $70,000 per annum (R. 25). As the Court of Claims points out (R. 41), this result in the beginning of the enterprise was by no means discouraging, especially since the hotel business in Asheville during that period was generally bad (R. 25), and the property had been used for hospital purposes for almost five years. The facts hardly bear out the appellant's claim of a loss in rental value from December 31, 1922, of $108,000 a year, $33,000 more than the rent which it received from the War Department except during the first year of the War Department's lease (R. 19) and $38,000 more than the rent which it received from the Treasury Department (R. 23), although the necessities of the Government undoubtedly caused it to pay a high rental for the property.

Furthermore, there are other facts disclosed by the record which make extremely questionable the appellant's claim that the reputation of its hotel was seriously impaired. It is significant that when the appellant opened its hotel to the public, the room which the War Department had used as the venereal ward was converted into a ladies' parlor. (R. 25.) The appellant could hardly have

thought at that time that the maintenance of the venereal ward had become widely known. It is significant, also, that during the period from March 10, 1923, to June 1, 1923, the hotel entertained two large conventions, one of which was that of the North Carolina Medical Society (R. 24), and that while those conventions were in progress there were days when more than one hundred and eighty guests were registered (R. 24). Furthermore there is nothing in the record to show that anyone failed to come to the appellant's hotel or left it because of its previous use as a hospital. (R. 41.)

Perhaps the most significant fact bearing upon the appellant's contention that the War Department's use of the property caused it great damage, is the fact that when the War Department ceased to occupy the property experts of the Treasury Department, "after a careful and exhaustive investigation and examination," found its value to be $888,000 (R. 31), $73,000 more than the property cost. The appellant was willing to sell the property to the Treasury Department at that price, but it now claims that at the expiration of the War Department's lease the market value of its property had been diminished by $600,000, its rental value by $448,000, and that it had sustained a total damage of $825,000, as the result of the War Department's use of the property.

It is doubtful if any claim of less merit has ever been presented to this Court. In support of it the

appellant has emphasized the cases of *Hersey* v. *Chapin*, 162 Mass. 176 and *Delano* v. *Smith*, 206 Mass. 365. It is unnecessary to add to the Court of Claims' discussion of the inapplicability of those cases to this case.

CONCLUSION

The motion to remand should be denied because the Court of Claims has found all ultimate facts necessary for a decision of the case and the judgment of the Court of Claims should be affirmed because the appellant has failed to prove either that the War Department violated the restrictive covenant, or that it suffered any damage or the extent of the damage which it suffered by reason of the alleged breach.

WILLIAM D. MITCHELL,
Solicitor General.

JEROME MICHAEL,
Special Assistant to the Attorney General.

MARCH, 1926.

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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925

No. 241

DORRIS MOTOR CAR COMPANY, APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

FILED JANUARY 9, 1925

(30,797)

(30,797)

SUPREME COURT OF THE UNITED STATES.

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INDEX

	Original	Print
Petition	1	1
Contract	6	3
Defendant's answer	19	13
Argument and submission of case	19	13
Findings of fact	20	13
Conclusion of law	26	21
Opinion of the court by Campbell, Ch. J.	27	21
Judgment of the court	28	22
Proceedings after entry of judgment	28	22
Plaintiff's application for appeal	29	22
Order of court allowing application	29	23
Clerk's certificate	30	23

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 30, 1925

[fol. 1]

IN THE COURT OF CLAIMS

No. 389—B

DORRIS MOTOR CAR COMPANY

v.

THE UNITED STATES

I. PETITION—Filed November 16, A. D. 1922

To the Honorable the Justices of the Court of Claims:

Your petitioner, the Dorris Motor Car Company, respectfully represents unto your Honors that it is a corporation engaged in the manufacturing business at St. Louis, Missouri, and was then and there so engaged during the years A. D. 1918 and 1919.

I

Contract

Your petitioner respectfully represents unto your Honors that on or about the 5th day of October, A. D. 1918, it entered into a written contract with the United States of America, a true copy of which said contract is annexed hereto and made a part hereof and marked Exhibit A for further certainty, wherein and whereby the United States agreed to buy and your petitioner agreed to manufacture and sell to the United States 1,450 Liberty Motor Governors, SH 12, at Twenty-eight Dollars and Ninety Cents ($28.90) each, making a total of Forty-one Thousand Nine Hundred and Five Dollars ($41,905),

[fol. 2] and 1,450 Liberty Motor Petrol Air Pumps, SH 902, at the sum of Thirty-seven Dollars and Seventy-five cents ($37.75) each, making a total of Fifty-four Thousand Seven Hundred Thirty-seven Dollars and Fifty Cents ($54,737.50), the total consideration for the entire contract being Ninety-six Thousand Six Hundred Forty-two Dollars and Fifty Cents ($96,642.50).

II

Readiness to Perform

Your petitioner did deliver to the United States the 1,450 Liberty Motor Governors, SH 12, aforesaid, and the United States did accept and pay the contract price for the same. Your petitioner did proceed forthwith to manufacture for delivery the 1,450 Liberty Motor Petrol Air Pumps, SH 902, called for by the aforesaid contract, and was at all times ready, willing and able to manufacture and deliver the said 1,450 Liberty Motor Petrol Air Pumps, SH 902, to the United States. Your petitioner further represents that by Article 14 of the aforesaid

contract, Exhibit A, it, your petitioner, was entitled to continue for thirty days with the manufacture of the articles contracted for after receipt of notice of termination of the contract, but your petitioner represents that the United States made no attempt to terminate the said contract under said Article 14 thereof, although requested to do so, and your petitioner avers that if the said contract had been terminated by the United States under the terms of said Article 14 thereof, then your petitioner could and would have completed the manufacture and delivery of said 1,450 Liberty Motor Petrol Air Pumps, SH 902, within the said thirty days during which it was entitled to continue production under the terms of said Article 14 of said Exhibit A.

[fol. 3]

III

Work Canceled

Your petition- respectfully represents that on or about the 17th day of December, A. D. 1918 (when the manufacture of the said 1,450 Liberty Motor Petrol Air Pumps, SH. 902, was two-thirds complete) the United States by letter directed your petitioner to suspend pro— under aforesaid contract, and your petitioner complied with the said request. Your petitioner further represents unto your Honors that on or about the 2d day of January, A. D. 1918 your petitioner did offer to resume production and to make and deliver the said 1,450 Liberty Motor Petrol Air Pumps, SH 902, to the United States, but the United States did then wholly refuse to accept and pay for said 1,450 Liberty Motor Petrol Air Pumps, SH 902, to the great damage of your petitioner.

IV

Damages

Your petitioner respectfully represents unto your Honors that the United States did pay to your petitioner the sum of Twenty Thousand Three Hundred Eighty-nine Dollars and Thirty-eight Cents ($20,389.38) by reason of certain expenditures incurred by your petitioner in the performance of the aforesaid contract and in partial settlement of the aforesaid contract, but did refuse to pay the following items claimed by your petitioner, which said items were a total loss [fol. 4] to your petitioner by reason of the breach of the aforesaid contract by the United States:

Loss of profits	$21,147.67
Overhead expense due to cancellation of aforesaid contract	5,035.35
Total loss remaining unpaid by the United States	$26,182.67

Your petitioner further represents that in addition to the above it sustained other losses for which no claim is made.

V

Summary

Your petitioner further shows unto your Honors that it is the sole owner of this claim and the only person interested therein; that no assignment or transfer of said claim or any part thereof or interest therein has been made, and that your petitioner is justly entitled to the amount herein claimed, to wit: Twenty-six Thousand One Hundred Eighty-two Dollars and Sixty-seven Cents ($26,182.67) from the United States after allowing all just credits, deductions and offsets and that your petitioner has at all times borne true allegiance to the Government of the United States and has not in any way aided, abetted or given encouragement to rebellion against the said Government.

Dorris Motor Car Company, by G. P. Dorris, President. John E. Hughes, Attorney for Claimant.

[fol. 5] Sworn to by G. P. Dorris. Jurat omitted in printing.

[fol. 6] EXHIBIT TO PETITION

"Copy of Contract Sued On"

War—Ord. P16036-2588Mc. O. O. Pl. Form No. 7

This agreement made this 5th day of October, 1918, between Dorris Motor Car Company, a corporation organized and existing under and by virtue of the laws of the State of Missouri and having an office at Laclede Avenue and Sarah St., St. Louis, Missouri, party of the first part, and the United States of America, Wm. Williams, Lt. Col., Ord. Dept. U. S. A., acting by direction of tthe Chief of Ordnance, United States Army, and under the authority of the Secretary of War, party of the second part,

Witnesseth:

W-ereas a state of war exists between the United States and certain foreign countries, constituting a national emergency, and the usual requirements of advertisement for bids are dispensed with.

Now, therefore, the parties hereto, in consideration of the mutual agreements herein contained have agreed and do hereby agree with each other as follows:

Article 1. Definitions.—Whenever in this contract the words hereinafter enumerated are used, they shall mean what is set opposite them:

Contractor: The party of the first part and its legal representatives, successors and assigns.

Chief of Ordnance: The Chief of Ordnance, the Acting Chief of Ordnance, or any duly authorized representative of either.

Contracting Officer: The officer in whose name this contract i executed, his successor or successors, his or their duly authorize agent or agents, and any one from time to time designated by th Chief of Ordnance to act as Contracting Officer.

Articles: The articles or things to be furnished under this contrac unless some other articles or things are specifically referred to.

Article II. Articles to be Furnished.—Deliveries and prices.— [fol. 7] The contractor shall manufacture for and furnish to th United States the articles hereinbelow described, in the number o amount, at the times and at the prices below stated; said articles t comply strictly with the specifications and drawings annexed o referred to below or in Schedule 1 hereto annexed; the United State shall accept and pay for said articles upon the terms and condition hereinafter set forth. The workmanship and quality of the article shall, in the absence of other provisions, be the best of their respectiv classes and free from latent defects.

Articles:

(A) Fourteen hundred fifty (1,450) Liberty Motor Governors SH 12.

(B) Fourteen hundred fifty (1,450) Liberty Motor Petrol Air Pumps SH 902.

Price:

(A) Twenty-eight and 90/100 dollars ($28.90) each governor. (B) Thirty-seven and 75/100 dollars ($37.75) each pump, or Ninety-six thousand, six hundred forty-two and 50/100 dollars ($96,642.50) for the entire quantity, f. o. b. cars, Contractor's plant, St. Louis, Missouri.

Deliveries:—Deliveries shall be made as follows:

1,450 Governors shall be delivered during October, 1918.
850 Pumps shall be delivered during December, 1918.
600 Pumps shall be delivered during January, 1919.

Complete delivery of the governors shall be made prior to November 1, 1918 and of the pumps prior to February 1, 1919.

War—Ord. O. O. Pl. Form No. 7.

Article III. Specifications.—The specifications and drawings, if any, hereto annexed or herein referred to, are made a part of this contract with like effect as if herein set out in full. In the event, of any, conflict between the contract and the specifications or drawings the provisions of the contract shall govern.

From time to time, by written notice to the Contractor, the Contracting Officer may make changes in the specifications and drawings or supplemental or substituted specifications and drawings. If any such change increases the cost to the Contractor, a fair addition shall [fol. 8] be made to its compensation; but if it reduces such cost a fair

deduction shall be made therefrom, all as shall be determined by the Chief of Ordnance. No claim for additional compensation hereunder shall be allowed, nor shall the compensation be reduced, unless the change has been ordered in writing. For any delay in delivery attributable to such changes, a corresponding extension of time shall be allowed the Contractor.

Article IV. Component Parts to be Furnished by United States.—The United States shall furnish without cost to the Contractor the materials and component parts listed on Schedule 2, in quantities determined by the Chief of Ordnance to be requisite for the performance of this contract. Should the Contractor be delayed in making deliveries of the articles by reason of delays in the furnishing of such materials or component parts by the United States, a corresponding extension of time shall be allowed the Contractor.

In addition to the raw materials and component parts listed on Schedule 2, the United States may from time to time, at its option, furnish to the Contractor other materials and component parts for use in the performance of this contract: Provided, however, That the Contractor has not previously and in good faith contracted for the purchase of such materials or component parts. Unless it is provided in writing that materials and component parts (other than those listed on Schedule 2) are furnished by the United States without charge, the United States shall be credited with the value thereof, f. o. b. Contractor's plant, fixed at the estimated cost of such materials or component parts used in determining the contract price of the articles, the Contractor to pay demurrage, cartage, and switching charges. Payments for the articles shall be reduced accordingly.

All materials and component parts furnished by the United States shall comply with specifications and shall remain the property of the United States. The Contractor shall account for all material and component parts furnished by the United States, the cost of which has not been paid by or deducted from payments made to the Contractor, in finished product, scrap, unused material or otherwise and shall make such disposition thereof as may be ordered in writing by the Chief of Ordnance. Upon final delivery of the articles, and prior to final payment thereof, the Contractor shall deliver to the Chief of [fol. 9] Ordnance a sworn statement, in form satisfactory to him, of the quantity of such unused material or component parts remaining in the Contractor's possession.

Article V. Change in Amounts.—This contract may be considered as completed and so certified by the Chief of Ordnance upon delivery to and acceptance by the United States of the articles, plus or minus 5 per cent thereof. In the former case there shall be a proportionate increase and in the latter case a proportionate decrease in the total amount payable under this contract.

Article VI. Delivery.—The articles shall be suitably packed, boxed and marked by the Contractor at its expense as directed from time to time by the Chief of Ordnance, and shall be delivered by the

Contractor f. o. b. cars at the railroad station nearest to the place of manufacture, unless some other place of delivery is herein specified. The Contractor shall, at the cost of the United States, ship the articles to any point in the United States designated by the Chief of Ordnance.

Article VII. Payment.—The United States shall pay to the Contractor the prices hereinbefore stated for all articles as and when delivered to and accepted by the United States. All payments shall be subject to correction for errors, if any.

Article VIII. Time.—Time is of the essence of this contract. The Contractor shall give the performance hereof preference and priority over any other work except work heretofore given preference or priority by the United States. It shall, from time to time, and whenever requested so to do, furnish the Contracting Officer reports on the progress of the work.

Article IX. Inspection—Rejection.—All materials and component parts unused or in process, the machinery, the equipment and the plant used in the performance of this contract, and the finished articles, shall at all times be subject to inspection by persons designated by the Chief of Ordnance, and the Contractor shall furnish reasonable facilities and assistance for all such inspection and for testing. Whatever of the materials or component parts not furnished by the United States, or of the articles, do not in all respects comply with the requirements of this contract, shall be rejected, and the [fol. 10] decision of the Chief of Ordnance with respect thereto shall be final. The Chief of Ordnance may require the replacement of all rejected materials, component parts, and articles, and the United States may withhold from the payments to be made hereunder an amount sufficient to cover the cost thereof until such replacement. Upon notice from the Contractor that the articles, or any of them, are completed and ready for delivery, final inspection shall be promptly made by the United States.

The process of manufacture shall be at all times subject to the inspection and supervision of the Chief of Ordnance.

Article X. Care of Property.—The Contractor shall use due and proper care to protect all property of the United States in its possession. Such property shall be suitably marked for identification and shall be kept separate and apart from other property.

Article Xa. Eighty Per Cent Clause.—A sum equal to 80% of the actual cost to the Contractor of direct materials, as defined in Ordnance Office pamphlet "Definition of 'Cost' Pertaining to Contracts," dated June 27, 1917, purchased by the Contractor in quantities requisite for the due and timely performance of this contract, and from sources approved by the Chief of Ordnance, will be paid to the Contractor by the United States monthly upon certificate of the inspecting and receiving officer that such materials have been delivered to the Contractor and inspected and approved by the United States. All such material shall, immediately upon coming into the possession of the Contractor, be marked for identification as the

Chief of Ordnance may direct. When any such payment shall have been made by the United States for such materials the ownership of the same shall vest in the United States. The Contractor shall replace either in money or in kind at the option of the United States all materials so owned by the United States which may subsequently develop latent defects, or become spoiled or destroyed through fault of the Contractor while in its possession.

Upon proper certificate of the inspecting and receiving officer of the United States, showing delivery and acceptance of any of the articles, the United States will pay to the Contractor the difference between the contract price for the articles delivered and the total sum theretofore paid to the Contractor on account of such articles.

[fol. 11] Article Xb. Costs under Article XIV shall be determined in accordance with the pamphlet entitled "Definition of 'Cost' Pertaining to Contracts," issued by the Office of the Chief of Ordnance, War Department, dated June 27, 1917, made a part hereof by reference.

Article Xc. All payments by the United States under this Contract will be made through the St. Louis District Ordnance Office.

Article Xd. The Petrol air pumps shall be boxed four (4) in a box.

Article Xe. The following parts are required per Petrol Air Pump unit (Stencil "B"):

Per unit	Part No.	Name
2	S H 900 A ..	Air Pressure Pump Bushing.
1	S H 900 A ..	Air Pressure Pump Pulley.
4	S H 900 C ..	Air Pressure Pump Cylinder.
1	S H 900 D ..	Air Pressure Pump Shaft.
1	S H 903 A ..	Air Pressure Pump Base.
4	S H 901 A ..	Air Pressure Pump Spring.
4	S H 901 D ..	Air Pressure Pump Piston.
4	S H 901 B ..	Air Pressure Pump Check Nut.
2	S H 901 C ..	Air Pressure Pump Bushing.
4	S H 901 E ..	Air Pressure Pump Displacement Plug.
1	S H 901 F ..	Air Pressure Pump Hole Cover.

The following Standard Parts are required per Petrol Air Pump unit. (Stencil "B"):

Standard Parts

8—5/16 x 3/4 cap bolts.
6—3/4 x 3/4 cap bolts.
1—1/2 U. S. standard nut.
1—No. 5 Woodruff key.

Article XI. Storage.—The Contractor shall provide at its plant storage capacity sufficient for the storage of — days' deliveries of articles at the rate of deliveries herein specified. From time to time,

and for so long as the Chief of Ordnance may require, the Contractor [fol. 12] shall safely and adequately store to the extent of such storage capacity any accepted articles which the United States is not ready to have shipped; such storage to be at the risk of the United States but at the cost of the Contractor. By written notice the Chief of Ordnance at any time may require the Contractor promptly to furnish additional storage capacity sufficient to store not more than —days' additional deliveries at said rate. Thereafter from time to time and for so long as the Chief of Ordnance may require, the Contractor shall safely and adequately store any accepted articles to the extent of such additional storage capacity, but at the cost and risk of the United States. The additional storage capacity shall be furnished at the Contractors' plant, if practicable, and when that is not practicable, at a place adjacent to or near the plant. Subject to the approval of the Chief of Ordnance, such place shall be selected by and the arrangements made therefor by the Contractor. If a portion of the land and buildings then belonging to the Contractor be used for such additional storage, the United States will pay to the Contractor a reasonable rental therefor, to be agreed upon, or, in the absence of an agreement, to be fixed by the Chief of Ordnance.

The articles stored under the provisions of this article after final inspection and acceptance shall be paid for as though they had been delivered f. o. b. cars, but the Contractor shall thereafter, upon the request of the United States and at the expense of the United States, transport the articles stored to the nearest point of shipment by railroad, load the same on cars, and ship the same to such point of destination as the Chief of Ordnance may direct. The United States shall pay to the Contractor all expense incurred for transportation of the articles to storage and cost of unloading and reloading cars at place of storage.

Article XII. Excusable Delays.— The Contractor shall not be held responsible for delays in delivery determined by the Chief of Ordnance to be due to delay in inspection, delay in the giving of shipping instructions to the Contractor, explosions, fires, riots, labor strikes, acts of war, acts of God, or to any other causes beyond the control of the Contractor. The Contractor shall use its best efforts to remove such cause of delay as speedily as possible, and immediately upon [fol. 13] the removal thereof shall proceed with the performance of this contract. The time for the making of deliveries shall be extended by the period of such delay, provided application therefor be made in writing within thirty (30) days after the removal of such cause for delay. Where, however, such delays have been substantial and not due to any act or omission of the United States, the Chief of Ordnance shall have the option either to cancel this contract or any of the deliveries that have been delayed upon the terms set forth in Article XIV hereof or to permit the Contractor to proceed with the performance of the contract.

Article XIII. Breach by Contractor.—If the Contractor shall abandon this contract or shall violate any material provision thereof,

or shall fail at any time to prosecute with diligence the manufacture of the articles or the performance of this contract or if this contract shall be assigned, the Chief of Ordnance may, without prejudice to any other rights or remedys or to any claim which the United States may have, terminate this contract by written notice and complete the performance hereof or enter into agreements with other parties for the completion of the performance hereof in whole or part or purchase in the open market or otherwise any articles remaining undelivered hereunder; and the Contractor shall pay to the United States all loss and damage incurred as a result of such action.

Article XIV. Termination.—This contract being necessitated by a state of war now existing, it is desirable and expedient that provision be made for its cancellation upon fair and equitable terms in the event of the termination or limitation of the war, or if in anticipation thereof or because of changes in methods of warfare the Chief of Ordnance should be of the opinion that the completion of this contract has become unnecessary. It is therefore provided that at any time, and from time to time, during the currency of this contract, the Chief of Ordnance may for any of the causes above stated notify the Contractor that any part or parts of the articles then remaining undelivered shall not be manufactured or delivered.

In the event of such complete or partial termination the United States shall inspect all completed articles then on hand and such as may be completed within thirty (30) days after such notice, and shall pay to the Contractor the price herein fixed for all articles accepted by and delivered to the United States. The United States [fol. 14] shall also pay to the Contractor the cost of the materials and component parts purchased by the Contractor for the performance of this contract and then on hand in an amount not exceeding the requirements for the completion of this contract provided they comply with the specifications, and also all costs shown by the Contractor to have been theretofore necessarily incurred in the performance of this contract and remaining unpaid; and the United States shall also protect the Contractor on all obligations incurred necessarily and solely for the performance of this contract of which the Contractor can not be otherwise relieved. To the above may be added such sums as the Chief of Ordnance may deem necessary to fairly and justly compensate the Contractor for work, labor and service rendered under this contract.

Title to all such materials and component parts paid for by the United States under this article shall, immediately upon such payment, vest in the United States.

The United States may refuse to make any payment or to reimburse the Contractor for or on account of material or component parts intended to form a part of the articles, whether unused or in the process of manufacture or manufactured, in respect of the delivery of which the Contractor shall be in arrears not due to causes beyond its control at the time of such termination.

Article XV. Precautionary Measures.—In addition to the ordinary precautions heretofore adopted by the Contractor for the guarding

and protection of its plant and work, the Contractor shall provid such additional watchmen and devices for protection of its plan and property and the work in process for the United States agains espionage, acts of war, and of enemy aliens as may be required b the Chief of Ordnance. The Contractor shall, when required, repor to the Chief of Ordnance, the citizenship, country of birth, or alie status of any and all of its employees. When required by the Chie of Ordnance the Contractor shall refuse to employ, or if already em ployed, forthwith discharge from employment and exclude from it works any person or persons designated by the Chief of Ordnanc for cause as undesirable for employment in a plant engaged o work for the United States. The United States shall pay to th Contractor as part of the cost of the articles any expense incurre by the Contractor which shall be determined by the Chief of Ord nance to be directly caused by the requirements of this article.

[fol. 15] Article XVI. Exploitation Forbidden.—The Contracto agrees to refrain from exploiting by publicity or otherwise its products manufactured in pursuance of this contract, and of any and all contracts and orders heretofore or hereafter entered into or placed with the Contractor, and its products manufactured under any ar rangements with the United States whatsoever, and the Contractor agrees to refrain from in any way publicly advertising the fact of the manufacture of said product, and to refrain from publishing or caus ing or allowing to be published any photographs, drawings, written or printed matter, or other data disclosing the articles, or parts of the same, or the process of manufacture, or the plans of the government, or any information concerning the same or which shall result in such disclosure. The Contractor agrees to submit to the Chief of Ordnance all pictures or printed matter showing, describing, or in any way relating to the progress of the work to be prosecuted under this contract and under any and all contracts and orders heretofore or hereafter entered into or placed with the Contractor, or under any arrangements with the United States whatsoever, which he may desire to publish, before publishing the same, and the Chief of Ordnance may prohibit such publication. The contractor further agrees to refrain from giving any information whatsoever relative to any experiments that may be carried out by it at the instance of the United States.

Article XVII. Contract not Assignable.—The contractor shall not assign, transfer, or otherwise dispose of this contract or any part thereof without the written consent of the Secretary of War, nor shall it assign any moneys due or to become due hereunder.

Article XVIII. Subcontracts.—The Contractor shall insert in every contract hereafter made in relation to the performance of this contract, a provision that such contract may be assigned by the Contractor and that it relates to this contract. The contractor shall, from time to time, upon request, exhibit to the Contracting Officer any and all contracts made in connection with the performance of this contract.

Article XIX. Waiver of Liens.—The Contractor hereby waives and releases all lien or right of lien now existing or that may hereafter arise for work or labor performed or materials furnished or for any [fol. 16] other reason or cause under this contract, under any lien laws, State or Federal, upon any component parts, materials, supplies, and the like coming into its possession, which it is herein contemplated shall presently or ultimately become the property of the United States, and the Contractor agrees not to create or suffer to be created any mortgage, lien, pledge, attachment, or other encumbrance upon any such component parts, materials, supplies, or other property in its possession intended to form a part of the articles to be delivered under this contract. In the event that such mortgage, pledge, lien, attachment, or encumbrance is created, the Contractor agrees to pay and discharge, or if it disputes the validity of the claim out of which such encumbrance arises, immediately to bond same to the end that all property shall at all times be and remain free from all encumbrances.

Article XX. Disputes.—Except as herein otherwise specifically provided, and doubts or disputes which may arise under this contract or as to its performance or nonperformance shall be referred to the Chief of Ordnance for determination. If the Contractor shall feel aggrieved at his decision, it shall have the right of appeal to the Secretary of War, whose decisions shall be final.

Article XXI. Patents.—The Contractor hereby covenants and agrees to hold and save the United States and all persons acting under them harmless from and against all and every demand or demands of any nature or kind for or on account of the adoption of any plan, model, design, or suggestion or for or on account of the use of any patented invention, article, or appliance that has been or may be adopted or used in or about the construction of said articles, or any part thereof, under this contract, and to protect and discharge the United States from all liability on account thereof or on account of the use thereof, by proper releases from the patentees, and by bond if required, or otherwise, and to the satisfaction of the Chief of Ordnance.

Article XXII. Notice.—Any notice addressed to the Contractor at its principal office and either there delivered or deposited in a postpaid wrapper in any post-office box regularly maintained by the United States, shall be deemed to have been served upon the Contractor. The addresses of the Contractor may be changed at any [fol. 17] time by notice in writing to the Contracting Officer. Nothing herein contained shall preclude service of notices upon the Contractor (1) where it is a corporation by delivery thereof to any of its officers or directors in person; (2) where it is a firm by delivery thereof to one of the partners; (3) where it is an individual by delivery thereof to him in person.

Article XXIII. Officials not to Benefit.—No Member of or Delegate to Congress or Resident Commissioner is or shall be admitted to any

share or part of this contract or to any benefit that may arise therefrom; but this article shall not apply to this contract so far as it may be within the operation or exception of section 116 of the act of Congress approved Mar. 4, 1909 (35 State., 1109).

Article XXIV. Prison Labor.—No person or persons shall be employed in the performance of this contract who are undergoing sentences of imprisonment at hard labor which have been imposed by the courts of the several States, Territories, or municipalities having criminal jurisdiction.

In witness whereof, the parties hereto have caused this contract to be duly executed in triplicate by their respective officers, thereunto duly authorized, the day and year first above written.

Dorris Motor Car Co., by Webster Colburn, First Vice-President, Contractor. United States of America, E. Newman, by Wm. Williams, Lt. Col. Ord. Dept. U. S. A., Contracting Officer.

Witnesses: D. M. McBride.

[fol. 18] Schedule 1 Attached to and a Part of a Certain Contract Between the United States of America and Dorris Motor Car Company and Dated the 5th Day of October, 1918

Each and every of the pamphlets, drawings, specifications, and other papers enumerated is made a part of the schedule and of the contract of which this schedule is a part.

Specifications:

For Item A—Ordnance Office Lubricant Specifications No. 3508, dated May 1, 1918.

Drawings:

For Item A—Ordnance Office Drawing 31-37-12, dated July 25, 1918.

Specifications:

For Item B—Ordnance Office Specifications:

(1) Test.—The pump must be able to produce a maximum pressure of six pounds and a normal pressure of four pounds.

(2) Slushing.—This unit to be thoroughly slushed with War Department lubricant per Ordnance Office Specifications No. 3508, dated May 1, 1918.

Drawings:

For Item B—Ordnance Office Drawings:

31-37-900—Dated August 29, 1918.
901—Dated August 30, 1918.
902—Dated August 30, 1918.
903—Dated August 30, 1918.

[fol. 19] II. Defendant's Answer—Filed Jan. 6, 1923

Comes now the defendant, by its Attorney General, and answering the petition of the claimant herein denies each and every allegation therein contained.

Robert H. Lovett, Assistant Attorney General. M. L. Blake, Attorney.

III. Argument and Submission of Case—Oct. 28, 1924

On October 28, 1924, this case was argued and submitted on merits by Mr. John E. Hughes, for plaintiff, and by Mr. E. S. McCrary, for the defendant.

[fol. 20] IV. **Findings of Fact, Conclusion of Law, and Opinion of the Court by Campbell, Ch. J.**—Entered December 1, 1924

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact

I

The Dorris Motor Car Company, plaintiff herein, is a corporation under the laws of the State of Missouri. During the years 1918 and 1919 it was engaged in the manufacturing business at St. Louis, Mo.

II

Under date of October 5, 1918, the plaintiff entered into a contract with the defendant, acting by Lieutenant Colonel Williams, of the Ordnance Department, for the manufacture and delivery of 1,450 Liberty motor governors and 1,450 Liberty motor petrol air pumps. The delivery of the 1,450 governors was to be made during October, 1918, 850 pumps were to be delivered in December, 1918, and 600 pumps during January, 1919, the complete delivery of the pumps to be made prior to February 1, 1919. A copy of the said contract is attached to the petition herein and is made a part of these findings

by reference. The contract is on a form printed in the Government Printing Office for the Ordnance Department, known as Form 600-b. The description of the articles to be manufactured and delivered, stated in Article II, was in typewriting. Articles Xa, Xb, Xc, Xd, and Xe are in typewriting. The specifications at the end of the contract were also in typewriting.

III

The 1,450 Liberty motor governors were manufactured and delivered by the plaintiff to the United States and were paid for at the contract price. None of the Liberty motor petrol air pumps was delivered to the United States. Prior to the execution of the contract, and acting under informal orders, the plaintiff proceeded with preparations for the manufacture and delivery of the articles mentioned in the contract.

[fol. 21]

IV

On December 14, 1918, the Ordnance Department requested the plaintiff to suspend operations under said contract. Upon the receipt of this notice to suspend an official of plaintiff, known as the general manager, secretary, and treasurer, was directed by plaintiff's board of directors to discuss the matter with the members of said local claims board. This he did, and a representative of the claims board stated to him that unless the cancellation or suspension was accepted the plaintiff would not get the cooperation of said local claims board toward getting compensation for the work that had been done. This information was carried back to the board of directors and they decided to accept and did agree to the suspension.

On December 17, 1918, the plaintiff notified the Ordnance Department that it would suspend operations in pursuance of the said request therefor. After that date the plaintiff did nothing further toward the completion of the pumps called for by said contract. On December 21, 1918, the Ordnance Department Claims Board, located at St. Louis, and acting under the Ordnance Department, notified the plaintiff of the transmission to it of the outline of method for presenting the claims of contractors, and plaintiff in conjunction with agents of the claims board proceeded to make up and present its claim growing out of said contract to the said district claims board. Prior to December 14 a representative of the plaintiff, acting for it, had a conversation with one of the agents of the War Department, in which plaintiff's representative objected to suspending operations, calling attention to the provision of Article XIV of the contract. This officer insisted that operations should cease, and thereafter plaintiff was notified in writing to suspend operations. The plaintiff suspended operations under said contract on December 17, 1918. The letter requesting plaintiff to suspend operations and the letter of plaintiff stating it would suspend operations under the contract do not appear in the record.

V

The plaintiff's claim as presented to the local board was as follows:

1. Unworked direct material	$6,899.98
2. Worked direct material	3,892.37
3. Direct labor and overhead	3,562.10
4. Other compensation:	
(a) Jones & Lamson lathe	1,065.12
(b) Fitchburg low-swing lathe	1,182.79
(c) Hendy lathe and attachments	1,115.48
(d) Installation of machinery	9.52
(e) Cost of tools, jigs, dies, patterns, etc	2,672.02
(f) Inward handling expense and storage	1,078.24
(g) Overhead for 6 months	5,035.35
(h) Loss due to cancellation	21,147.67

The local claims board approved these items generally, but on sending forward their report and action in the premises to the Ordnance Department for confirmation, it was corrected by the Ordnance Department and returned with the approval of items 1, 2, and 3, and items (a), (b), (c), (d), and (e). In lieu of item (f), amount-[fol. 22] ing to $1,078.24, they allowed items (i), (j), (k), (l), and (m), shown in the exhibit to the agreement of April 19, mentioned in Finding VI and here referred to, amounting to $1,392.55. Item 4 (g), $5,035.35, was disallowed, as was also item (h), "loss due to cancellation." The result was that there was disallowed of plaintiff's claim item (g) for $5,035.35, item (h), loss due to cancellation, $21,147.67, thus making an allowance to plaintiff of $16,279.21, as will more fully appear from the award, a copy of which is attached to the last-named contract, dated April 19, 1919, between plaintiff and the United States, referred to in Finding VI.

VI

After the return by the Ordnance Department to the local claims board of its action on said claim an agreement was made between the plaintiff and the United States, dated the 19th day of April, 1919, a copy of which is as follows:

"Settlement Contract

"Form 2-C

"This contract made this 19th day of April, 1919, between the Dorris Motor Car Company, a corporation organized and existing under and by virtue of the laws of the State of Missouri, and having an office at St. Louis, Missouri, party of the first part (hereinafter called contractor), and the United States of America, by E. S. Ready, major, Ordnance Department, United States Army (hereinafter called contracting officer), acting by direction of the Chief of Ord-

nance, United States Army, and under authority of the Secretary of War, party of the second part:

"Whereas a certain contract was entered into between the United States and the contractor numbered War-Ord-P 16036-2588 ME, dated October 5, 1918 (hereinafter called 'original contract' which term also includes, wherever used herein, all agreements or orders, if any supplementary to said contract, except this agreement); and

"Whereas the furnishing and delivery of further articles under said original contract will exceed the present requirements of the United States; and

"Whereas it is in the public interest to amend said original contract as herein provided and the execution of this supplemental contract is in the financial interests of the United States; and

"Whereas pursuant to the original contract, the contractor, has incurred expenses and obligations for the purpose of furnishing and delivering articles or work remaining undelivered under said original contract; and

"Whereas the contractor is willing to waive any and all rights that it may have under the provisions of the original contract to a specified notice of termination or to continue the performance of said contract to any extent after the receipt of such notice of termination; and

"Whereas it is desirable from time to time to settle and pay certain separate items of expense incurred by the contractor, where such items have been examined and audited by the contracting officer [fol. 23] and found to remain unpaid and to have been properly incurred in the performance of the original contract.

"Now, therefore, in consideration of the promises and of the mutual covenants herein contained, it is agreed between the parties hereto as follows:

"1. This supplemental agreement shall not be taken to cancel or terminate any of the rights or obligations of the parties to said original contract except as herein expressly provided.

"2. This supplemental contract shall operate as an exercise of the termination or cancellation of said original contract provided in the clause thereof relating to termination or cessation of hostilities or termination in the public interest except that the contractor waives any and all rights that it may have under the provisions under the original contract to a specified notice of termination or to continue the performance thereof to any extent, and the contractor shall furnish and deliver and the United States shall accept and pay for no more articles, work, or services, agreed to be delivered or done, whether for product, equipment, or facilities or other purposes under said original contract, except that all articles, work, or services delivered and accepted on or before the date of this supplemental agreement, under and in pursuance of the original contract and not yet paid for, shall be paid for in accordance with the provisions of said original contract, and the contractor will hereafter do no act or thing which will increase the liability of the United States or the amount to be paid by it, and except that there is hereby

reserved to the contractor the right to assert an additional claim against the United States arising out of alleged letters, telegrams, and orders from the United States pertaining to an alleged amendment to the said original contract and which has been known as First Supplemental Contract on amendment to War-Ord.-No. P 16036-2588 ME. The total number of finished units or amount of work delivered and accepted on or before the date of this supplemental agreement and under and in performance of original contract is 1,450 Liberty motor governors SH 12. The total number of Liberty motor petrol air pumps SH 902 called for by the original contract which have been delivered or accepted is none.

"3. The United States shall forthwith pay to the contractor for the items of—

(1) Unworked direct materials	$6,889.98
(2) Worked direct materials	3,892.37
(3) Direct labor and overhead expense	3,562.10
(4) One double spindle	1,065.12
(5) One low swing lathe	1,182.79
(6) Special facilities	1,115.48
(7) Installation of machinery expense	9.52
(8) Cost of tools, jigs, dies, patterns, etc	2,672.02
Total	20,389.38
Less deductions—being the fair value at which the contractor will retain title to scrap from worked materials—$147.19 and worked and unworked materials and equipment and special facilities, $3,962.98, making total deductions	4,110.17
Balance	16,279.21

"which have been examined and found to be due the contractor by the United States the sum of sixteen thousand two hundred seventy-[fol. 24] nine dollars and twenty-one cents ($16,279.21), which payments the contractor hereby agrees to accept in full satisfaction of said items.

"4. The United States shall also pay from time to time in the same manner such other sum or sums as may be found justly due the contractor by the contracting officer for any item or items of expenditure or obligations which have been properly incurred by said contractor for the purpose of performing the original contract. As to each item the payment therefor shall be in full settlement and satisfaction thereof. Where such items or item involve transfer of property, payment shall be made upon the inspection and acceptance of such item or items.

"5. The United States agrees to pay to the contractor such further sum as may be found to be the balance of the total amount justly due to the contractor.

"6. Title to all property specified in Schedule A hereto annexed and made a part hereof which property the contractor expressly warrants to be unencumbered by either the legal or equitable claims, shall vest in the United States, and title to all property specified in Schedule B hereto annexed and made a part hereof shall vest in the contractor immediately upon execution and approval of this agreement. All such property the title to which is to vest in the United States by virtue of payments made hereunder shall in so far as practicable be kept, properly cared for, and marked by the contractor in such manner as the contracting officer may direct. The contractor shall make such disposition of said property for the account of the United States as the contracting officer may direct.

"7. This agreement shall not become a valid and binding obligation of the United States unless and until the approval of the Claims Board of the Ordnance Department has been noted at the end of this instrument.

"In witness whereof the parties hereto have caused this agreement to be duly executed in five parts by their authorized officers as of the day and year first above written.

"Dorris Motor Car Company (Contractor), by Webster Colburn, Vice President. United States of America, by E. S. Ready, Major, Ord. Depart., U. S. A., Contracting Officer. (Seal.)

"Attest: J. F. Culver, Secretary.

"Witnesses: Davis Biggs (For contractor's signature), Josephine Burnes (for contracting officer's signature).

"Approved: Claims Board, by Earle T. Robinson, Captain, Ordnance Department, U. S. A."

[fol. 25] Attached to the last-named contract is the award by the St. Louis District Claims Board as approved as aforesaid, dated April 18, 1919, as follows:

"Award

"St. Louis District Claims Board,
"Dated April 18th, 1919.

"Matter of Partial Settlement of Claim of Dorris Motor Car Company (Constractor). War-Ord.-No. P 16036-2588 ME

"On reading and considering the verified statement of claim and supporting accounts and papers of the above-named contractor submitted herein, dated December 31st, 1918, and on hearing and considering the matter, it is found:

"1. The United States shall forthwith pay to the contractor in partial settlement of its claim the sum of $16,279.21, made up as follows:

Allowances

(1) Unworked direct materials	$6,889.98	
(2) Indirect materials	None	
(3) Worked direct materials	3,892.37	
(4) Direct labor and overhead expense	3,562.10	
(7) Commitments for materials or service	None	
(8) Claims for other compensation:		
a. One double spindle Jones & Lamson lathe	1,065.12	
b. One Fitchburg low swing lathe	1,182.79	
c. One Hendy lathe and attachments	1,115.48	
d. Installation of machinery, expense	9.52	
e. Cost of tools, jigs, dies, patterns, etc.	2,672.02	
Total of contractor's claim		$20,389.38

Deductions

(1) Claims of the United States against the contractor arising out of or incident to the prime contract or for loans in connection therewith	None	
(2) Amount due to the United States, being the fair value of property transferred to the contractor in this settlement	None	
(3) Scrap retained by contractor from worked materials	$147.19	
(4) Allowance to the United States for fair value of property retained by contractor in this settlement	3,962.98	
Total deductions		4,110.17
Balance due contractor		16,279.21

"2. Delays in delivery or performance under the contract to which this award relates have been carefully investigated and it is found that in so far as delayed deliveries may have been accepted they were accepted by the authority of the Secretary of War, and such delays were not due to the fault of the contractor, have resulted in no damage to the United States, have not justified the cancellation of the contract in the interest of the United States, and no deduction should be made from the contractor's compensation because of such delays.

"3. No member of this Ordnance District Claims Board has any interest in this contractor.

[fol. 26] "4. The settlement in accordance with the foregoing findings, subject, however, to the approval of the Ordnance Claims

Board, shall be in full satisfaction of any and all demands or claims in law or in equity which the contractor, its successors, representatives, agents, and assigns, has or may have growing out of or incident to the contract hereinabove mentioned for the items of unworked direct materials, worked direct materials, direct labor and overhead expense, one double spindle, one Fitchburg low swing lathe, one Hendy lathe and attachments, installation of machinery expense, cost of tools, jigs, dies, and patterns, purchased and expended specifically for the above contract and which was on hand at termination of work thereon.

"5. We, the St. Louis Ordnance District Claims Board, have verified and caused to be verified to our satisfaction the contractor's statement of fact as to expenditures made and materials on hand, and do hereby certify that to the extent that the same were allowed by us in the partial settlement as hereinabove stated in detail, such items were verified to our satisfaction. There are no known claims of the United States against the contractor arising out of or incident to the original contract which are not covered in reaching the foregoing determination.

"St. Louis Ordnance District Claims Board, by M. E. Singleton, Chairman.

"We will accept the conclusion and amount stated in the foregoing award.

"Dorris Motor Car Company (Contractor), (Signed) by Webster Coburn."

The item (g) "Overhead for six months," $5,035.35, claimed in the petition, has been abandoned by the plaintiff in this case. It claims that if the contract had been completed it would have made a profit of $21,147.67. This amount was arrived at by taking the total of the amount of 1,450 pumps at $37.75 each, aggregating $54,737.50, and deducting from that sum the amount of material plaintiff had purchased, the labor and overhead that had been expended, and estimated amount of overhead and labor necessary to have completed the work, an item for installing machinery, and the cost for tools, jigs, dies, etc., and a portion of the fixed overhead.

On December 14, 1918, plaintiff was ready, able, and willing to perform the work contemplated by the contract and could have completed the same within thirty days from that date. Upon completion of the work in accordance with the contract its profit would have been $21,147.67. After the receipt of the sum allowed by the claims board and the Ordnance Department plaintiff filed a claim with the Board of Contract Adjustment, organized under the Dent Act. It claimed the item of profits herein asserted and also the item of overhead charge that is abandoned in this suit. The board did not allow either claim, and its action was subsequently approved by the Secretary of War.

Conclusion of Law

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and its petition is therefore dismissed.

[fol. 27] Judgment is rendered against the plaintiff in favor of United States for the cost of printing the record in this cause, the amount thereof to be entered by the clerk and collected by him according to law.

Opinion—Filed Dec. 1, 1924

Campbell, Chief Justice, delivered the opinion of the court:

The issue between the parties is reduced to the one question of whether plaintiff can recover the profits it could have made if the work called for by the contract had been completed. The contract provided for its termination. It stated that it was necessitated because of war conditions and accordingly made provision for its cancellation. In the case of Russell Motor Car Co., 57 C. Cls. 464, 261 U. S. 514, it appeared that the contract was terminated under the statute of June 15, 1917, and any right to anticipated profits was denied. In the instant case the contract itself makes provision for a cancellation and the controlling principle in the two cases is the same. What should be paid in the event of termination is set forth in Article XIV of the contract, and admittedly all items therein contemplated were paid unless the profits here claimed should also be included. If that item of profits is recoverable, it is difficult to see what benefit accrues from the stipulated right of termination, the plaintiff having been made whole as to all other items growing out of the contract.

The action in terminating the contract should be referred to the powers given in that regard by the terms of the agreement, and, such action being authorized, no presumption is to be indulged that the termination was a breach. But whether the Chief of Ordnance notified the contractor or not that certain of the articles should not be manufactured or delivered is wholly immaterial in view of the fact that plaintiff, when requested to suspend operations, agreed to suspend and did suspend, and the parties proceeded to an ascertainment of the amounts which should be paid plaintiff in accordance with the terms of the contract. This mutual agreement to suspend, followed by an actual suspension, was an effectual waiver of plaintiff's right to proceed. (See Savage Arms Co., 57 C. Cls. 71, 85; affirmed, — U. S. —; decided November 17, 1924.) Not only this, but when the claim of amounts to be allowed was in issue, plaintiff accepted the award of the claims board as approved by the Ordnance Claims Board. It executed a supplemental agreement intended to carry the settlement into effect. Among other recitals of the supplemental agreement is one in which plaintiff waived "any and all rights to a specific notice of termination" or to continue the performance of the original contract to any extent after the re-

ceipt of such notice. It was then paid the sum of $16,279.21, and having received this sum in the circumstances stated, it can not now recover more. (See Savage Case, 92 U. S. 382, 388; Baird Case, 96 U. S. 430; Willard, Sutherland & Co. v. United States, 262 U. S. 489.)

The petition should be dismissed. And it is so ordered.

Graham, Judge; Hay, Judge; Downey, Judge, and Booth, Judge, concur.

[fol. 28] V. JUDGMENT OF THE COURT—Entered Dec. 1, 1924

At a Court of Claims held in the City of Washington on the First day of December, A. D., 1924, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises, find in favor of the defendant, and do order and adjudge that the plaintiff, as aforesaid, is not entitled to recover and shall not have and recover any sum in this action of and from the United States; and that the petition herein be and the same is dismissed: And it is further ordered and adjudged that the United States shall have and recover of and from the plaintiff, as aforesaid, the sum of Fifty-six dollars and three cents ($56.03), the cost of printing the record in this court, to be collected by the clerk, as provided by law.

By the Court.

VI. PROCEEDINGS AFTER ENTRY OF JUDGMENT—Dec. 13, 1924

On December 13, 1924, the plaintiff filed a motion for a new trial.

On January 5, 1925, the court handed down the following order on said motion:

Order

It is ordered by the court this 5th day of January, 1925, that the plaintiff's motion for new trial be and the same is overruled.

[fol. 29] VII. PLAINTIFF'S APPLICATION FOR APPEAL—Filed January 8, 1925

The plaintiff, Dorris Motor Car Company, by John E. Hughes, its attorney, makes application to the Honorable Court of Claims for an appeal from the court's decision in the above-entitled cause, decided December 1, 1924, to the Supreme Court of the United States.

John E. Hughes, Attorney for Plaintiff.

Filed January 8, 1925.

VIII. Order of Court Allowing Plaintiff's Application for Appeal—January 8, 1925

It is ordered by the Court this 8th day of January, 1925, that the plaintiff's application for appeal be and the same is allowed.

[fol. 30] Clerk's Certificate

[Title omitted]

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of the case; of the findings of fact, conclusion of law and op- of the court by Campbell, Ch. J.; of the judgment of the court; of the proceedings after the entry of judgment; of the plaintiff's application for an appeal; of the order of the court allowing said application.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this Eighth day of January, A. D., 1925.

F. C. Kleinschmidt, Assistant Clerk Court of Claims. (Seal Court of Claims.)

Endorsed on cover: File No. 30,797. Court of Claims. Term No. 241. Dorris Motor Car Company, appellant, vs. The United States. Filed January 9th, 1925. File No. 30,797.

Office Supreme Court, U. S.
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Clerk

No. 241

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1925.

DORRIS MOTOR CAR COMPANY,
Appellant,

vs.

THE UNITED STATES,
Appellee.

Appeal from the Court of Claims.

BRIEF FOR APPELLANT.

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HAWKINS & LOOMIS CO., LAW PRINTERS, CHICAGO

INDEX.

PAGE

Grounds of jurisdiction 1

Statement of case 1-3

Point 1.

The opinion of the Court of Claims is unsound..... 4-9

Point II.

The rights to recover profits is elementary..... 9

Point III.

War legislation did not authorize the termination of this contract 9-14

Point IV.

Appellant is entitled to the profit it would have made if it had been allowed to proceed under its contract 14-16

List of Cases Cited.

Act of June 15, 1917; Chap. 29, Sec. 1, 40 Stat. 182..... 9-11

Act of July 1, 1918; Chap. 114, 40 Stat. 9-11

Act of March 4, 1917; Chap. 180, 39 Stat. 1192 ..... 9, 10

Broadbent Portable Laundry Co. v. United States, 56 C. Cl. 128 14

Board of Contract Adjustment; Vol. 4, Decisions Board of Contract Adjustment, 729 15

Corpus Juris, Vol. 17, Damages, Sec. 96, p. 767 6

PAGE

Daley v. Pugh, 131 N. E. 836 11

Economy Coal Co., 149 Iowa 24; 127 N. W. 1109 12

Haugen v. Sundseth, 106 Minn. 129; 118 N. W. 666 13

Hern v. Mains, 20 Wal. 493; 22 L. Ed. 395 12

Ruling Case Law, Vol. 8, Damages, Sec. 14, p. 442 6

Russell Motor Car Co. v. United States, 261 U. S. 514 ..... 9, 10

Savage Arms Co. v. United States, 266 U. S. 217 7

Shaw v. North Pa. R. R. Co., 101 U. S. 557 11

Simpson v. Boston & M. R. R. Co., 176 Mass. 359; 57 N. E. 674 11

Thomas v. West Jersey Co., 101 U. S. 82; 25 L. Ed. 950 12

Thomson Electric Welding Co. v. Peerless Wire Fence Co., 190 Mich. 496; 157 N. W. 67 13

United States v. Behan, 110 U. S. 338 9

United States v. Purcell Envelope Company, 249 U. S. 313 9

United States v. Spearin, 248 U. S. 132 9

Walla Walla v. Walla Walla Water Co., 172 U. S. 1 14

Warren v. Stoddart, 105 U. S. 224 6

Yates v. United States, 15 C. Cl. 119 6

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1925.

DORRIS MOTOR CAR COMPANY, *Appellant,*	
vs.	Appeal from the Court of Claims.
THE UNITED STATES, *Appellee.*	

BRIEF FOR APPELLANT.

GROUNDS OF JURISDICTION.

This appeal from the Court of Claims was filed in this Court on January 9, 1925 (R. 23) and as the amount involved is $21,147.67, this Court has jurisdiction of the appeal.

STATEMENT OF THE CASE.

Appellant brought this suit in the Court of Claims to recover $21,147.67 for profits it would have made had it been allowed to continue production under a war contract for the length of time allowed by the contract.

The Court of Claims gave judgment against the appellant.

The essential facts as set forth in the findings of fact made by the Court of Claims (R. 13 to 20) are in essence that on October 5, 1918 the plaintiff entered into a contract in writing with the United States acting through the Ordinance branch of the War Department, which said contract is contained in the record (R. 3 to 12) and made a part of the findings of fact of the Court of Claims (R. 13, finding 2).

The contract provided that the appellant should manufacture and deliver to the United States 1450 Liberty Motor Governors, which were manufactured and delivered to the United States and paid for and which do not enter into this case, and the contract also provided that appellant should manufacture and deliver to the United States 1450 Liberty Motor Petrol Air Pumps. None of the Petrol Air Pumps were delivered to the United States.

When appellant was proceeding with the manufacture of the Petrol Air Pumps the United States on December 14, 1918 notified the appellant to suspend operations under its contract. Appellant protested, but did suspend operations on December 17, 1918. (Finding IV, R. 14.)

There was a termination clause in the contract (Article XIV, R. 9) which provided that the Chief of Ordnance might notify the appellant that any of the articles contracted for should not be manufactured or delivered at any time, but provided also that "*in the event of such complete or partial termination the United States* shall inspect all completed articles then on hand *and such as may be completed within thirty days after such notice,* and shall pay to the contractor the price hereunder fixed for all articles accepted by and delivered to the United States." (Italics ours.)

The United States refused to allow the company to proceed with production for thirty days under the above quoted clause of the contract, but insisted that operations should cease at once upon the notice of December 14, 1918. (R. 14, Finding IV.)

The Court of Claims found that if the appellant had been allowed to proceed for thirty days after December 14, 1918, it would have earned a profit of $21,147.67. This finding is in the following language:

> "On December 14, 1918, plaintiff was ready, able, and willing to perform the work contemplated by the con-

tract and could have completed the same within thirty days from that date. Upon completion of the work in accordance with the contract its profit would have been $21,147.67." (R. 20, last paragraph.)

The question presented to this court is whether the United States was justified in law in refusing to allow the appellant to proceed for thirty days after notice of termination of the contract, as the above quoted provision of the contract provided appellant should have the right to do. If not, it is obvious appellant is entitled to be placed in the same position it would have been had it been allowed to proceed for said thirty days and is entitled to recover the sum of $21,147.67.

SUMMARY OF POINTS.

1. *The opinion of the Court of Claims is unsound.*

2. *The right to recover profits is elementary.*

3. *The war legislation authorizing the termination of certain contracts does not apply in the instant case.*

4. *Appellant is entitled to the profit it would have made if it had been allowed to proceed under its contract.*

I.

The opinion of the Court of Claims is unsound.

The opinion of the Court of Claims (R. 21, 22) assigns three reasons for giving judgment against the appellant. Those reasons are (1) the "contract provided for its termination * * *. The action in terminating the contract should be referred to the powers given in that regard by the terms of the agreement, and such action being authorized, no presumption is to be indulged that the termination was a breach"; and (2) "Plaintiff, when requested to suspend operations, agreed to suspend and did suspend, and the parties proceeded to an ascertainment of the amounts which should be paid plaintiff in accordance with the terms of the contract. This mutual agreement to suspend followed by an actual suspension was an effectual waiver of plaintiff's right to proceed," and (3) "Not only this, but when the claim of amounts to be allowed was at issue, plaintiff accepted the award of the Claims Board as approved by the Ordnance Claims Board. It executed a supplemental agreement intended to carry the settlement into effect. Among other recitals in the supplemental agreement is one in which plain-

tiff waived any and all rights to a specific notice of termination or to continue the performance of the original contract to any extent after the receipt of such notice. It was then paid the sum of $16,279.21 and having received this sum in the circumstances stated, it cannot now recover more."

The contract's provision for termination.

The first reason assigned by the Court of Claims is that the action of the Government in terminating the contract was authorized by the terms of the agreement.

We do not read the agreement as authorizing the immediate termination of the contract by the Government at any time. The provision for the termination of the agreement must be read as a whole and that provision (R. 9, Article 14) reads in part as follows:

> "In the event of such complete or partial termination the United States shall inspect all completed articles then on hand *and such as may be completed within thirty days after such notice* and shall pay to the contractor the price herein fixed for all articles accepted by and delivered to the United States." (Italics ours.)

It is obvious that the above provision of the contract did not provide for its immediate termination and did not authorize the United States to terminate it at once, but provided that after notice of termination the appellant should have thirty days during which to continue production. The Court of Claims has found that appellant could have completed the contract within said thirty days. If it had been allowed to proceed for the time stated in the contract it would have made the profit now sued for. Obviously, then, the United States cannot claim that its action was justified by the termination provision of the contract, and the opinion of the Court of Claims so far as it is based upon this provision is clearly unsound.

The claim that appellant when requested to suspend operations did so.

The second reason assigned by the Court of Claims for its judgment is that the appellant when requested to suspend operations agreed to suspend and did suspend.

The finding of the Court of Claims (R. 14, finding IV) shows that appellant protested and called attention to its right to proceed for thirty days under the contract, but the War Department insisted on the immediate suspension of operations notwithstanding this thirty day clause.

The obvious reply to this reason assigned by the Court of Claims for its judgment is that the appellant was bound by law to suspend operations when requested to do so by the other party to the contract. It is an elementary rule that one may not make damages by proceeding with work when directed by the other party to suspend. (Damages, 8 R. C. L. Section 14, P. 442) also (Damages 17, C. J. Section 96, P. 767.)

The Court of Claims itself has stated in *Yates* v. *United States*, 15 C. Cl. 119, 125, this rule of law as follows:

> "The renunciation of a contract by a defendant where the other party has a right to perform stops performance and precludes claimant from making damages by proceeding with his work."

This Court said in *Warren* v. *Stoddart*, 105 U. S. 224, 230:

> "The rule is, that where a party is entitled to the benefit of a contract and can save himself from a loss arising from a breach of it at a trifling expense or with reasonable exertion, it is his duty to do it, and he can charge the delinquent with such damages only as with reasonable endeavors and expense he could not prevent."

It is a matter of mathematical computation that even if the Government be compelled to pay the anticipated profit sued for in this case it is saved the sum of $11,807.90 by the sus-

pension of this contract. If appellant had proceeded for thirty days it would have collected the anticipated profits and also the sum of $11,807.90 in addition to what has been paid to date. (This is a matter of mathematical computation from the total contract price.)

The Court of Claims cites as the reason for its conclusion that "this mutual agreement to suspend, followed by an actual suspension, was an effectual waiver of plaintiff's right to proceed," the case of *Savage Arms Co.* v. *United States*, 266 U. S. 217. This was a case where the United States suspended a contract and thereafter the United States and the company entered into a new agreement providing for the delivery of a lesser amount of articles. It was a clear case of novation. Such is not the case here. There was no new agreement entered into in this case providing for the delivery of a lesser amount of articles than originally contracted for. There was merely a suspension of the contract by the United States and the appellant's protested acquiescense in this suspension which it was bound by law to give.

Appelant's acceptance of the award of the claim's board.

The Court of Claims next states as its final reason for giving judgment against the appellant that the appellant accepted the award of the Claims Board in the amount of $16,279.21 "and having received this sum in the circumstances stated, it cannot now recover more."

The award of the Claims Board is set out in the findings of fact. (R. 18.)

The award is headed "Matter of Partial Settlement of Claim of Dorris Motor Car Company." The first paragraph of the award reads as follows:

> "The United States shall forthwith pay to the contractor *in partial settlement* of its claim the sum of $16,279.21, made up as follows:" (Italics ours.)

The award itself states that it is only in "partial settlement" of the claim and it does not purport to be in complete settlement. To say that it was in complete settlement is to wholly disregard the words "partial settlement" which were used in the award itself.

The Court of Claims cites three cases in support of its conclusion, and having read them all we are at loss to apprehend in what manner any of them has any application whatever to the facts of the case at bar. In none of them were payments made and accepted stated to be in partial settlement only.

The settlement contract which the Court of Claims refers to in its opinion as having been executed with the intention of carrying the award into effect is found in the record. (R. 15 to 18.) It is recited therein that it is in the public interest to amend the original contract and that the execution "of this supplemental contract" is in the financial interests of the United States.

This partial settlement contract was made April 19, 1919, and the notice to suspend was dated December 14, 1918 and more than thirty days having passed from the date of the suspension notice, appellant had then no right to proceed with production, and hence, the provision of paragraph 2 of this contract waiving "any and all rights that it may have under the provisions under the original contract to a specified notice of termination or to continue the performance thereof to any extent" waived nothing, because the notice of termination had been given and four months having passed since the date of that notice there was then existing no right in the appellant to continue production or to any further notice. This contract expressly reserved the right to assert an additional claim against the United States and provided that the amount paid was only paid in satisfaction of the items expressly named, and further provided in paragraph 5 for the payment of further sums to the appellant by the United

States. Annexed to it was the award of the Claims Board which states that it is in partial settlement of the claim. It was obviously the intention of the parties to reserve this matter of profits for litigation by the appellant and the contract was obviously drawn for the purpose of not baring the due presentation of this claim. The uncontradicted evidence showed that the only items in controversy when this settlement contract was signed were the profits and the overhead items.

II.

The right to recover profits is elementary.

That the right to recover profits is elementary needs no argument in this court. (See *United States* v. *Behan*, 110 U. S. 338, 344; *United States* v. *Purcell Envelope Company*, 249 U. S. 313; *United States* v. *Spearin*, 248 U. S. 132.)

III.

War legislation did not authorize the termination of this contract.

It was not claimed in the Court of Claims that war legislation authorized the termination of this contract. The Court of Claims in its opinion makes passing reference to the case of *Russell Motor Car Co.* v. *United States*, 261 U. S. 514, but does not base its decision upon that case.

We have carefully examined the war legislation and the only statutes which we have found which confer power to cancel contracts are the Acts of March 4, 1917, June 15, 1917 and July 1, 1918. These Acts confer upon the President the power to suspend or cancel or alter certain contracts under certain circumstances.

The Act of March 4, 1917, may be put to one side because it was limited in its authority to March 1, 1918, and the contract in the case at bar was entered into on October 5, 1918.

The Act of June 15, 1917, which was before this Court in the case of *Russell Motor Car Co.* v. *United States*, 261 U. S. 514, under the heading "Emergency Shipping Fund" conferred upon the President the power "to modify, suspend, cancel or requisition any existing or future contract for the building, production or purchase of ships or material." The Liberty Motor Petrol Air Pumps were not ships or parts thereof and the Act of June 15, 1917, defined material as follows: "The word material shall include stores, supplies and equipment for ships, and everything required for or in connection with the production thereof."

The contract in the case at bar was entered into by the Ordnance Branch of the War Department and probably the Petrol Air Pumps were designed for use in Liberty Motors employed in tanks used by the Tank Corps. They did not come within the definition of material embraced in the Act of June 15, 1917, which by its terms disclosed the intent of Congress to apply to contracts for ships or materials for ships only. It is limited to naval contracts and did not apply to War Department contracts.

We now come to the Act of July 1, 1918, which was entitled "An Act Making Appropriations For the Naval Service For the Fiscal Year Ending June 30, 1919, and For Other Purposes." The Act began "Be it enacted that the following amounts be and they are hereby appropriated * * * *for the naval service,*" (italics ours).

The Act empowered the President "within the limits of amounts appropriated therefor to modify or cancel any existing contract for the building, production or purchase of ships or war material."

This Act apparently only applied to contracts payable from appropriations made for the naval service.

These statutes are all statutes conferring a right which did not exist at common law and being in derogation of the common law, must be construed strictly. This court said in *Shaw* v. *North Pa. R. R. Co.*, 101 U. S. 557: "No Statute is to be construed as altering the common law further than its words import."

It is to be noted that the Act of June 15, 1917, conferred a power with reference to "existing or future contracts," while the later Act of July 1, 1918, intending to confer a power with respect to the same subject matter, eliminating the words "or future" and conferred the power only with respect to "any existing contract." The elimination of these words is significant. The general rule in such cases is stated by the Indiana Supreme Court in *Daley* v. *Pugh*, 131 N. E. 836, at page 838, as follows:

> "It is well settled that where a statute is amended or re-enacted in different language, it will not be presumed that the difference in the two statutes was due to oversight or inadvertence on the part of the legislature; on the contrary it will be presumed that the language was intentionally changed for the purpose of affecting a change in the law itself."

Wholly aside from the change in the language of the two acts, the word "existing" when considered in connection with the rule that statutes in derogation of the common law are to be strictly construed, cannot be held to apply to a contract which was not an "existing contract" at the time of the passage of the Act.

A statute with reference to "existing" rights of way was held to apply only to such rights of way as were existing at the time of the passage of the statute, and not to those coming into existence afterwards. *Simpson* v. *Boston & M. R. R. Co.*, 176 Mass. 359; 57 N. E. 674.

However, as we have said, these acts throughout are limited by their terms to contracts provided for by naval appropriations and do not apply to war department contracts.

It is unnecessary to consider whether the United States had a right under existing law to terminate this contract, because if such right had been given by law to any executive officer of the Government it would have been at most an optional right. A statute of this character from its very nature could not have been mandatory, but from necessity would have vested in the officer an option to apply it or not to apply it.

At the date of making the contract at bar, it will not be presumed that officers of the Government did not know the effect of existing law upon their right to terminate the contract, but on the contrary it must be presumed that they knew the law. It necessarily follows that if they had any right under the law to terminate it, they knew it at the time, and when they specifically provided in the contract for a specific method of terminating it, they thereby excluded all others, and bound the Government to exercise the right to terminate the contract as expressly provided for, and in accordance with that provision.

The rule of law applicable here is thus stated in *Beck & Sons* v. *Economy Coal Co.*, 149 Iowa 24; 127 N. W. 1109, 1111, where it is said:

> "These express grants clearly negatived any implied one which might otherwise arise under the maxim '*Expressio Unius Est Exclusio Alterius.*' The expression of one is the exclusion of another. *Hern* v. *Mains*, 20 Wall. 493; 22 L. Ed. 395; *Thomas* v. *West Jersey Co.*, 101 U. S. 82; 25 L. Ed. 950. This rule it will be observed is applicable to contracts as well as to statutes and it seems to me is quite controlling here. The grant was for an express purpose and it confines the use of entries and tracts to these purposes. All others were by necessary implication excluded."

The United States having expressly bound itself to terminate the contract in a particular manner, excluded the right to terminate it in any other manner.

Even had the contract contained an express provision in the very words of these unapplicable statutes, yet if following that provision, there had been the qualification that the United States would take such articles as the contractor should complete within thirty days after such notice of termination, the appellant would clearly have had the right to proceed with production for thirty days after receipt of the termination notice.

It is true that existing law is a part of the contract as a general rule, but this is subject to the qualification that it is not a part of the contract to the extent that the contract shows an intention to depart therefrom. (106 Min. 129; 118 N. W. 666.) The rule must not be overlooked that a contract will be construed most strongly against the party preparing it. In this case the Government prepared the contract. It was printed in the printing office and is on a standard ordnance department form.

Assuming (but not conceding) that the Government had a right to terminate this contract under any existing law and that this right would have been implied in the contract had no method of termination been expressed in the contract, yet the expression of one method of termination excluded all others and prevented their implication.

The rule is tersely and lucidly stated in *Thomson Electric Welding Co.* v. *Peerless Wire Fence Co.*, 190 Mich. 496; 157 N. W. 67, 69, where it is said:

> "The expression in a contract of one or more things in a class, applies to the exclusion of all not expressed, although all would have been implied had none been expressed."

In *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1-22, it is said:

> "While the special act is silent with reference to the revocation of contracts to supply water, we think the maxim '*Expressio Unius Est Exclusio Alterius*' is applicable, and that it was clearly the intention of the legislature to supersede the general law in that particular."

Moreover, it should be borne in mind that there was no attempt by the President or by anyone purporting to act for him to cancel the contract under war legislation nor has anyone up to the present writing attempted to justify the cancellation of this contract by war legislation.

IV.

Appellant is entitled to the profit it would have made if it had been allowed to proceed under its contract.

We have previously cited the authorities which support the holding that appellant is entitled to profits. A case awarding profits in the Court of Claims under a war contract is *Broadbent Portable Laundry Co.* v. *United States*, 56 C. Cl. 128.

At first consideration the profits in this case may seem somewhat high, but it is common knowledge that during war time money might have been invested at eight per cent or even nine per cent in securities of the best industrial corporations, and under these conditions it could hardly be expected that capital would embark upon business and assume the incidental risk without being compensated therefor. Moreover, it has been shown by the evidence that a large loss was sustained on another contract of the company, that the profit on the rest was very small, and it is a matter of every day manufacturing experience that one contract will show a fair profit, while another may show a loss, and considerable lee-

way must be allowed in contracts which show a profit in order to offset those contracts upon which loss is realized.

This Court takes judicial notice of public laws and knows that the war profits taxes, as high as eighty per cent, prevailing during this period, prevented any corporation realizing exorbitant profits.

The Court of Claims states in its opinion that if the defendant be compelled to pay these profits it is difficult to see what benefit it can take under the termination clause. The obvious answer is that if the termination clause had literally been followed the appellant, as found by the Court of Claims, would have completed the contract and would have received the entire contract price which sum would not only have included the items spent to the date of the suspension, but also the profit here sued for, and in addition the sum of $11,807.90, which is the difference between the two items mentioned and the total contract price. This sum represented the cost of completing the contract and it would have paid appellant's rent, officers' salaries and overhead expense for the period necessary to complete the contract so that appellant not only lost the profits it would have made, but also lost the advantage of having its overhead carried by this contract for the period necessary to complete it.

It is worthy of note that in finding 5 (R. 15) the Court of Claims finds that the Local Claim Board at St. Louis approved the item of profit which is sued for in this suit, but their action was disallowed at Washington. The representatives of the Government who were on the field of action and who understood the situation recommended this claim for payment.

The reason for the action at Washington in disallowing the claim is expressed in the opinion of the Board of Contract Adjustment (Vol. 4, Decisions Board of Contract Adjustment, page 729) to be merely that the supply circulars

exclude anticipated profit as an element in the settlement of contracts. Obviously this is no legal reason whatever for denying the claim.

For the foregoing reasons we respectfully request that the judgment of the Court of Claims be reversed.

All of which is respectfully submitted.

Dated January 16, 1926.

JOHN E. HUGHES,
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First National Bank Building,
Chicago, Illinois.

In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 241

DORRIS MOTOR CAR COMPANY, APPELLANT

v.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

THE OPINION OF THE COURT OF CLAIMS

The Findings of Fact, Conclusions of Law, and the Opinion of the Court of Claims appear at pages 13 and 21 of the Record and are reported in 60 Ct. Cl. 68.

GROUNDS OF JURISDICTION

The Dorris Motor Car Company by an appeal under Section 242 of the Judicial Code filed January 9, 1925, seeks to review a judgment of the Court of Claims entered December 1, 1924 (R. 22), which denied the company's claim of $21,147.67 for prospective profits.

STATEMENT

The question in this case is whether the appellant is entitled to recover the profits it would have made if its contract with the United States had not been terminated. It received, under a contract of settlement, reimbursement for all other losses resulting from the termination.

The Dorris Motor Car Company entered into a contract with the Government, dated October 5, 1918, for the manufacture of 1,450 Liberty Motor governors at $28.90 each and the same number of Liberty Motor petrol air pumps at $37.75 each. (R. 3–13.) The governors were to be delivered during October, 1918, and the air pumps during the following December and January. (R. 4.) By Article XIV of the original contract provision was made for its termination in the event of the termination or limitation of the war, or if in anticipation of the termination of the war the completion of the contract should be deemed unnecessary. (R. 9.) The only notice provided for in such case was that the chief of ordnance should "notify the Contractor that any part or parts of the articles then remaining undelivered shall not be manufactured or delivered." There was a further provision that:

> In the event of such complete or partial termination the United States shall inspect all completed articles then on hand and such as may be completed within thirty (30) days after such notice, and shall pay to the Con-

> tractor the price herein fixed for all articles accepted by and delivered to the United States.

The United States also agreed to pay in such event for the cost of materials, component parts, labor, and other items on uncompleted articles. There was no provision for the payment of any profit on the uncompleted part of the contract.

The governors were delivered and paid for. The air pumps had not been completed. (R. 14.) The armistice came. In a conversation with one of the agents of the War Department a representative of the contractor objected to a suspension of operations and referred to Article XIV of the contract. The officer insisted that operations cease, but the operations did not cease. (R. 14, Finding IV.)

On December 14, 1918, the Ordnance Department by letter "requested the plaintiff to suspend operations under said contract." (R. 14.) Upon receipt of this request the contractor directed its general manager to discuss the matter with the members of the local claims board at St. Louis. A representative of the claims board stated that unless the suspension request was accepted the contractor would not receive the cooperation of the claims board in obtaining compensation. Thereupon the contractor's board of directors "decided to accept and did agree to the suspension." (R. 14.) On December 17, 1918, the contractor notified the Government that "it would suspend operations

in pursuance of the said request therefor," and thereafter did nothing further towards the completion of the contract. The letters requesting and agreeing to suspension were not offered in evidence. (Finding IV, R. 14.)

A few days after the contractor suspended operations the local claims board informed the contractor that it had received an outline of a method by which claims should be presented. Thereupon the contractor and agents of the claims board prepared a claim for the contractor. (R. 14.) This claim included expenditures amounting to approximately $20,000 for labor and overhead and for material and equipment obtained for the purpose of manufacturing the pumps. (Finding V, R. 15.) It also included an item for " Loss due to cancellation," in the sum of $21,147.67, and an item for " Overhead for six months," in the amount of $5,035.35. The local claims board sent the claim to the Ordnance Department Claims Board for approval. This Board approved the items for material, equipment, direct labor, and overhead with slight modifications, but disallowed the item for " Loss due to cancellation " and the item for " Overhead for six months." (R. 15.) The contractor accepted the revision and entered into an agreement with the Government designated as a " Settlement Contract, Form 2-C " (R. 15), dated April 19, 1919, by which the Government agreed to pay to the contractor $16,279.21, the sum allowed by the Ordnance Department less a value placed upon the

property which it was agreed the contractor might retain. The Settlement Contract contained the following recitals (R. 16):

> Whereas the furnishing and delivery of further articles under said original contract will exceed the present requirements of the United States; and
>
> Whereas it is in the public interest to amend said original contract as herein provided * * *; and
>
> * * * * *
>
> Whereas the contractor is willing to waive any and all rights that it may have under the provisions of the original contract to a specified notice of termination or to continue the performance of said contract to any extent after the receipt of such notice of termination; * * *.

The parties agreed as follows (R. 16):

> 2. This supplemental contract shall operate as an exercise of the termination or cancellation of said orignal contract provided in the clause thereof relating to termination or cessation of hostilities or termination in the public interest except that the contractor waives any and all rights that it may have under the provisions under the original contract to a specified notice of termination or to continue the performance thereof to any extent, and the contractor shall furnish and deliver and the United States shall accept and pay for no more articles, work, or serv-

> ices, agreed to be delivered or done, whether for product, equipment, or facilities or other purposes under said original contract, except that all articles, work, or services delivered and accepted on or before the date of this supplemental agreement, under and in pursuance of the original contract and not yet paid for, shall be paid for in accordance with the provisions of said original contract, and the contractor will hereafter do no act or thing which will increase the liability of the United States or the amount to be paid by it * * *.

The Settlement Contract provided that the rights and obligations of the parties should not be deemed canceled or terminated thereby except as provided therein and contained the following reservation on behalf of the contractor (R. 16–17):

> * * * there is hereby reserved to the contractor the right to assert an additional claim against the United States arising out of alleged letters, telegrams, and orders from the United States pertaining to an alleged amendment to the said original contract and which has been known as First Supplemental Contract on amendment to War–Ord.–No. P16036–2588ME.

There is nothing in the record explaining or identifying the matter referred to in this reservation or the nature of the "First Supplemental Contract."

The Settlement Contract provided that the United States should pay the items enumerated

therein. It was also agreed that the United States should pay from time to time such other sum or sums as might be found justly due the contractor by the contracting officer for items of expenditure incurred in the performance of the original contract. The contractor accepted the compensation paid pursuant to the Settlement Contract.

Thereafter the contractor instituted this suit in the Court of Claims for prospective profits in the sum of $21,147.67, the amount set forth in the claim as the item "Loss due to cancellation," and rejected by the Ordnance Department before the execution of the Settlement Contract. (R. 1–3.) The contractor also demanded the payment of the overhead item of $5,035.35, but this item was abandoned. (R. 20.) The Court of Claims found that the contractor could have completed all of the pumps within thirty days after December 14, 1918, and that its profit would have been $21,147.67 if it had completed performance. (R. 20.)

In its petition the contractor alleged as the breach that production was suspended in compliance with the Government's request, and that on or about the second of January it offered to resume production and to manufacture and deliver the air pumps, "but the United States did then wholly refuse to accept and pay" therefor "to the great damage of your petitioner." (R. 2.) The petitioner failed to prove the offer to resume and the refusal by the United States. (R. 13–22.) The contractor now argues that the request for suspension and its

acceptance constituted an anticipatory breach and that the waiver of the right to continue "waived nothing." (Brief, 8.) The Government asks for an affirmance on the ground that production was suspended by consent and the right to continue canceled by contract.

SUMMARY OF ARGUMENT

I. If the contract had been terminated as therein provided, the contractor would have been bound to continue operations for thirty days and the United States would have been bound to take and pay for all air pumps which could have been completed within thirty days after notice of termination.

The finding of the Court of Claims is that the suspension of work and the failure of the contractor to continue work for thirty days was by mutual agreement and not the result of an order from the United States to cease work nor of an anticipatory breach by the United States in the form of a declaration of its intention not to take and pay for the pumps which could be completed in thirty days.

II. The Settlement Contract expressly provided that the contractor waived any right it had under the original contract to continue performance for thirty days after notice of termination. As the right to continue for thirty days after notice was the only provision on which could be based a claim for prospective profits on uncompleted work, it follows that the settlement agreement relieved the United States of liability for prospective profits.

There was ample consideration for the Settlement Agreement in the termination of the contractor's obligation to continue for thirty days and in the adjustments made on other items. The settlement left the parties in the same position as if the original contract had not contained the clause requiring the United States to take and pay for such pumps " as may be completed within thirty days after such notice " of termination. With this deletion, the liabilities of the United States were admittedly discharged.

ARGUMENT

I

Production was suspended by consent

All of the facts relating to suspension of production as found by the Court of Claims are incorporated in Finding IV. (R. 14.) The court found that " on December 14, 1918, the Ordnance Department requested the plaintiff to suspend operations under said contract." This was not a command or a direction; it was only a request. The Government carefully avoided any act which might constitute a breach of contract. The letter was intended by the Government and accepted by the contractor as a suggestion for a discussion. A command requires obedience. A request solicits acquiescence. Upon receipt of the letter the company did not stop manufacture. On the contrary, its board of directors sent its general manager to discuss the matter with the members of the local claims

board. This he did. At this meeting there was no command to stop manufacture, no demand to minimize damages. The members of the local claims board acted strictly within their powers—the institution of negotiations for a settlement. They did not assume authority to interfere in the production of munitions. At this conference a representative of the claims board stated that unless the suspension was accepted the contractor would not receive the cooperation of the claims board in obtaining compensation. After this discussion the board of directors decided to and did agree to the suspension. (R. 14.) The board of directors evidently considered it to the interest of the company to deal with a friendly claims board in the adjustment of other items rather than to insist on the right to continue for thirty days.

On December 17, 1918, the plaintiff sent its reply to the Ordnance Department. There was no suggestion that it had stopped manufacture in obedience to a command, or had reduced damages after an anticipatory breach. The contractor stated that "it would suspend operations in pursuance of the said request therefor." Within a few days the local claims board notified the plaintiff of the receipt of an outline of a method for presenting claims. Agents of the claims board assisted the plaintiff in preparing its claim for compensation which resulted in the Settlement Contract.

After finding the above facts the court adds that prior thereto a representative of the contractor

and an agent of the War Department, whose identity and authority are not disclosed, had held a conversation in which the representative objected to suspension and called attention to Article XIV of the contract and the officer insisted that operations cease (R. 14), but there was no cessation at that time. See *Rubber Trading Co.* v. *Manhattan Rubber Manufacturing Co.*, 221 N. Y. 120.

In its opinion the Court of Claims referred to the acts in December as "a mutual agreement to suspend." Such acts do not constitute a repudiation of the contract. A request to suspend is not a breach. *Vogt Bros. Mfg. Co.* v. *Sloss-Sheffield Steel & Iron Co.* (C. C. A.), 297 Fed. 54; *McGregor* v. *Estate of Ross*, 96 Mich. 103, 106; *Gill Mfg. Co.* v. *Hurd*, 18 Fed. 673. A suggestion to delay performance is not a breach. *Brockenbrough* v. *Champion Fibre Co.* (C. C. A.), 176 Fed. 840. An attempt to modify an agreement is not a breach. *Bernstein* v. *Meech*, 130 N. Y. 354; *Fayette-Kanawha Coal Co.* v. *Lake & Export Coal Corp.*, 91 W. Va. 132. Even a threat to abandon a contract during negotiations is not a breach. *Hardeman-King Lumber Co.* v. *Hampton Bros.*, 104 Tex. 585, 588. There must be an unconditional and unequivocal repudiation, a positive refusal of further performances in order to justify the promissee in treating the contract as abandoned and in instituting suit for anticipatory profits. *Smoot's Case*, 15 Wall. 36, 48, 49; *Dingley* v. *Oler*, 117 U. S. 490, 502; *Frank F. Pels Co.* v. *Saxony Spinning Co.* (C. C. A.), 287 Fed. 282 (cert.

den., 263 U. S. 702); *Southern Cotton-Oil Co.* v. *Heflin* (C. C. A), 99 Fed. 339, 343; *Vittum* v. *Estey*, 67 Vt. 158, 161; *Wells* v. *Hartford Manilla Co.*, 76 Conn. 27; *Ollinger & Bruce Dry Dock Co.* v. *James Gibbony & Co.*, 202 Ala. 516; *Rochm v. Horst*, 178 U. S. 1. Whether in any case the acts and surrounding circumstances constitute such a repudiation and refusal is generally a question of fact. *Colorado Yule Marble Co.* v. *Collins*, (C. C. A.), 230 Fed. 78, 81; *Dobbling* v. *York Springs Ry. Co.*, 207 Pa. St. 123; *McGregor* v. *Estate of Ross*, 96 Mich 103; *Vogt Bros. Mfg. Co.* v. *Sloss-Sheffield Steel & Iron Co.* (C. C. A.), 297 Fed. 54. The Court of Claims has determined these facts in favor of the Government. Production was deferred by a "mutual agreement to suspend."

II

The contract was terminated by agreement

The contractor suspended operations by consent. Any right to continue was subsequently surrendered by contract. After the item for prospective profits had been rejected by the Ordnance Department and the other items substantially approved, the parties entered into the Settlement Contract. (R. 15–18.) The temporary nature of the suspension was recognized. The contract recited that the furnishing and delivery of further articles "under said original contract will exceed the present requirements of the United States." As an

inducement for the Government to enter the Settlement Contract it was stated that the contractor was willing to waive its rights "under the provisions of the original contract to a specified notice of termination or to continue the performance of said contract to any extent after the receipt of such notice of termination." The contractor desired payment of its items of expense as rapidly as they could be determined from time to time. The rights of the parties were to be protected except as expressly changed.

It was provided that (R. 16):

> This supplemental contract shall operate as an exercise of the termination or cancellation of said original contract provided in the clause thereof relating to termination or cessation of hostilities or termination in the public interest except that the contractor waives any and all rights that it may have under the provisions under the original contract to a specified notice of termination or to continue the performance thereof to any extent * * *.

And it was provided that—

> the contractor shall furnish and deliver and the United States shall accept and pay for no more articles * * *.

This Settlement Contract clearly recognized that the original contract continued in existence for performance by both parties, and that additional articles might be delivered. The obligations of both

parties in this respect were modified and limited to the articles previously delivered. The Liberty Motor governors had been delivered, the petrol air pumps had not. The Settlement Contract was substituted for the notice of termination and the contractor waived the right to continue for thirty days. The articles delivered and accepted and the items of expense on uncompleted articles were to be paid for pursuant to the original contract.

The termination clause of the original contract provided: "In the event of such complete or partial termination the United States shall inspect all completed articles then on hand and such as may be completed within thirty (30) days after such notice, and shall pay to the Contractor the price herein fixed for all articles accepted by and delivered to the United States * * *" and the items of expense incurred in relation to the uncompleted articles. (R. 9.) The original contract was accordingly modified, and as modified has been performed by the Government. (See *Savage Arms Corporation* v. *United States*, 266 U. S. 217.)

There was reserved to the contractor "the right to assert an additional claim against the United States arising out of alleged letters, telegrams, and orders from the United States pertaining to an alleged amendment to the said original contract and which has been known as First Supplemental Contract on amendment to War–Ord.–No. P16036–2588M E." (R. 17.) There is nothing in the record

either to identify or to indicate the nature of these alleged letters, telegrams, and orders or to suggest the purpose of the said alleged "First Supplemental Contract." The silence of the record precludes any discussion of this reservation.

If, as the contractor claims in its brief (p. 8), "the notice of termination had been given" in December, the contractor failed to take advantage of the provision authorizing a continuance of production for thirty days after receipt of the notice. The Government has accepted all of the articles completed, and has paid for all of the articles delivered and the other items of expense. This was the full extent of its obligation. It is unnecessary to consider what the rights or obligations of the parties might have been if the negotiations had failed. (See *College Point Boat Corporation* v. *United States*, 267 U. S. 12.)

The negotiations were successful and it was agreed that the air pumps should not be completed. The operations had been suspended by consent. The obligations have been canceled by contract. The judgment should be affirmed.

WILLIAM D. MITCHELL,
Solicitor General.

JOHN VANCE HEWITT,
ALFRED N. HEUSTON,
Special Assistants to the Attorney General.

MARCH, 1926.

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SUPREME COURT OF THE UNITED STATES.

Nos. 237, 240 and 241.—October Term, 1925.

Sun Ship Building Company, Appellant, 237 *vs.* The United States.		
The Kenilworth Company, Appellant, 240 *vs.* The United States.	Appeals from the Court of Claims.	
Dorris Motor Car Company, Appellant, 241 *vs.* The United States.		

[April 19, 1926.]

Mr. Chief Justice Taft delivered the opinion of the Court.

These are three appeals from the Court of Claims which it is convenient to dispose of together.

No. 237.

The Sun Ship Building Company sought compensation on account of several items, chiefly one for loss sustained by it in obeying the request of certain naval officers and the Secretary of the Navy to hold free from other use a ship way which they thought would probably be needed for the construction of one of a number of mine sweepers which the claimant was under a cost plus contract to build. The claimant had private contracts to execute in which it could use this way, and which were thus delayed. The negotiations as to this way took place before the contract was drafted and executed. The contract provided for a Compensation Board to fix the cost, and specified elements of cost to be considered, including a proper proportion for loss resulting from displacement of, or delay in, work contracted for prior to the date of the contract caused by or attributed to work under emergency conditions by the contractor for the Government and items similar thereto in prin-

ciple. The Court of Claims held that all the items of the claim were covered by the decision and award of the Board except one for $1,500 for which it gave judgment. On the findings and the contract we hold the conclusion correct, deny the motion to remand and affirm the judgment.

No. 240.

The Kenilworth Company leased its hotel at Asheville to the Government for five months for use as a hospital, with a restriction that it should not be used for the purpose of receiving for treatment any person having tuberculosis in any form or any other like contagious or obnoxious disease, provided, however, that this should not apply to a patient housed temporarily in the premises for the purpose of an operation or the like. The suit was for breach of this restriction. The finding of the Court of Claims showed that no tuberculosis cases as such were received, and that the only ones actually housed were brought in for the purpose of an operation or the like. It was also alleged by the claimant that syphilitic cases were treated in the hospital. The finding of the Court was that such cases were not contagious within the meaning of the contract and denied the claim for damages. There is nothing in the record or in the other findings on which we can reach a different conclusion. We deny the motion to remand for further findings and affirm the judgment.

No. 241.

The Dorris Motor Car Company had a contract with the Government for the manufacture of Liberty Motor governors and petrol air pumps. The contract provided for its cancellation by the Government in the event of the termination of the war or in anticipation thereof, upon thirty days' notice and payment for all articles delivered during the contract and the thirty days' period. The Ordnance Department notified the contractor to suspend operations under the contract December 14, 1918. The general manager of the claimant discussed the question of termination with the local Claims Board at St. Louis, which declined to recommend payment for anything unless the suspension was accepted. Thereupon a complete settlement was made, and the amount agreed upon paid. There was a reservation in the settlement which by no reasonable construction could include the claim here made. The claim was

r profit for what might have been made in the 30 days. The ourt of Claims held that the claim must fail by reason of the ecuted settlement and we affirm that judgment.

Valuable time was taken in hearing these cases. After arguments behalf of the claimants, we declined to hear the other side be- use the correctness of the judgments of the Court of Claims was ear. It is fortunate for all that under the Act of February 13, 25, judgments of the Court of Claims entered after May 13, 25, can only be reviewed here after a showing of merits.

A true copy.

Test:

Clerk, Supreme Court, U. S.